

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX**

POINT PARK UNIVERSITY

Employer

and

Case 6-RC-12276

NEWSPAPER GUILD OF PITTSBURGH/
COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 38061, AFL-CIO, CLC

Petitioner

REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION ON REMAND

This case is before me following a remand from the Board regarding the status of the Employer's full-time faculty members. As discussed more fully below, consistent with my original decision, which has been further explicated and amplified herein, I conclude that the full-time faculty members are not managerial employees.

On October 20, 2003, Newspaper Guild of Pittsburgh/Communications Workers of America, Local 38061, AFL-CIO, CLC, herein called the Petitioner or the Union, commenced this proceeding by filing a representation petition under Section 9(c) of the National Labor Relations Act, seeking to represent a unit including all full-time faculty members of Point Park University, herein called the Employer. A hearing officer held a hearing on 20 days between November 12, 2003, and January 16, 2004.

On April 27, 2004, based on that hearing record, I issued a Decision and Direction of Election in this matter wherein I concluded, inter alia, that the Employer's full-time faculty members were not managerial employees and that the unit of approximately 77 employees constituted an appropriate unit.

On May 25, 2004, the Employer filed a Request for Review with the Board, contending that full-time faculty members are managerial employees who are excluded from the coverage of the Act. On June 23, 2004, the Board denied the Employer's Request for Review. Following an election conducted on May 26, 2004, the Union was certified on July 9, 2004 as the exclusive collective-bargaining representative of the employees in the appropriate unit. Shortly thereafter, when the Union requested recognition and bargaining, the Employer refused to recognize and bargain with the Petitioner in order to test certification.¹

Ultimately, the United States Court of Appeals for the District of Columbia Circuit heard oral argument on January 17, 2006, and issued a Decision on August 1, 2006, granting the Employer's Petition for Review, denying without prejudice the Board's cross-application for enforcement of the Board's Order, and remanding the case to the Board for proceedings consistent with the Court's opinion.

The United States Court of Appeals for the District of Columbia Circuit found, in discussing the Decision and Direction of Election in this matter, that "some findings suggest the faculty are managerial employees, while others suggest they are not." The D.C. Circuit said that the Decision and Direction of Election failed to explain which factors are significant and which less so, and why, in determining, pursuant to the Supreme Court's decision in NLRB v. Yeshiva University, 444 U.S. 672 (1980), that the Employer's full-time faculty were not managerial employees. Consequently, the D.C. Circuit remanded the case to the Board to provide the required explanation for, or reconsideration of, its conclusion. Point Park University v. NLRB, 457 F.3d 42, 44 (D.C. Cir. 2006).

¹On August 11, 2004, the Petitioner filed an unfair labor practice charge at Case 6-CA-34243 alleging violation of Sections 8(a)(1) and (5) of the Act. On August 31, 2004, I issued a Complaint based on the Employer's refusal to recognize and bargain with the Union, and the Employer thereafter filed an Answer. Based thereon, a Motion for Summary Judgment was filed by Counsel for the General Counsel on October 4, 2004. The Board granted the Motion for Summary Judgment, finding that the Employer violated Sections 8(a)(1) and (5) of the Act, and ordered the Employer to recognize and bargain with the Union. Point Park University, 344 NLRB No. 17 (2005). The Employer then filed a Petition for Review with the United States Court of Appeals for the District of Columbia Circuit. The Board filed a cross-application for enforcement of the Board's Order.

The Board accepted the Court's remand and invited the parties to submit statements of position with respect to the issues raised by the remand. On February 28, 2007, the Board issued an Order remanding the proceeding to me and granting the Employer's motion to reopen the record.² The remand portion of the Board's Order states that "this case is remanded to the Regional Director for further appropriate action consistent with this Order, including reopening of the record and the issuance of a Supplemental Decision."

On March 16, 2007, I issued an Order Reopening Case 6-RC-12276, Order Reopening the Record and Receiving Exhibits, Order Closing Record and Briefing Schedule. I reopened the record to receive into evidence Employer's Exhibits 71(a)-(j), which are selected Faculty Assembly minutes, agenda and a summary and Employer Exhibit 72, the 2001 Report to the Faculty, Administration, Trustees, Students of Point Park College, Pittsburgh, Pennsylvania, by An Evaluation Team Representing the Commission on Higher Education of the Middle States Association of Colleges and Schools, herein called the Middle States Report.³ I also set a briefing schedule.

On April 13, 2007, the Employer and the Petitioner submitted briefs, and the amici curiae⁴ filed a statement of position in support of the Employer.

² One of the issues the D.C. Circuit Court considered was the Board's denial of the Employer's request to reopen the record, in order to supplement it with minutes of certain Faculty Assembly meetings.

On December 14, 2006, the Employer filed both a Statement of Position to the Board Upon Remand from the United States Court of Appeals for the District of Columbia Circuit and a Motion to Reopen and Supplement the Record specifically setting forth which Faculty Assembly documents it was seeking to offer into the record. The Employer also moved to reopen the record and supplement it with a Report to the Faculty, Administration, Trustees, Students of Point Park College, Pittsburgh, Pennsylvania, by An Evaluation Team Representing the Commission on Higher Education of the Middle States Association of Colleges and Schools. In remanding this case to me the Board granted the motion to reopen the record.

³ In my Order I specified in detail what was being offered by the Employer and I received those exhibits. None of the parties objected to the receipt of this evidence and the Employer made no further offer, nor did it seek to proffer additional testimony.

⁴ The American Council on Education ("ACE"), the National Association of Independent Colleges and Universities ("NAICU"), the Council of Independent Colleges ("CIC") and the Association of Independent Colleges and Universities of Pennsylvania ("AICUP"), herein called the amici, submitted a statement of position with the consent of all parties.

In its decision, the D.C. Circuit Court requested an explanation or reconsideration of the conclusion that the Employer's full-time faculty members are not managerial employees under the test announced by the Supreme Court in Yeshiva. The Court noted that it had previously provided guidance to the Board on the proper application of the required analysis in such cases as LeMoyne-Owen College v. NLRB, 357 F.3d 55 (D.C. Cir. 2004) ("LeMoyne-Owen II").

In this regard, the Court correctly observed that the proper analysis turns on the type of control faculty exercise over academic affairs at an institution. Moreover, making the distinction between professional employees, who may unionize, and managerial employees, who may not unionize, requires a fact-intensive inquiry into the specific responsibilities of employees and the weighing of the facts to determine whether or not the persons at issue are involved in the formulation, determination and effectuation of management policies.⁵ The correct analysis, according to the Court, must also look beyond self-serving descriptions of the role of faculty or the administration of a university to determine "whether the faculty in question so controls the academic affairs of the school that their interests are aligned with those of the university or whether they occupy a role more like that of a professional employee in the 'pyramidal hierarchies of private industries.'" Point Park University, 457 F.3d at 48. The Court enumerated "the Yeshiva factors," the degree of faculty control over which must be considered in determining managerial status. They are: curriculum, course schedules, teaching methods, grading policies, matriculation standards, admission standards, size of the student body, tuition to be charged, and location of the school.

The evidence and arguments presented by the parties with respect to the status of the full-time faculty has been carefully reevaluated to address the D.C. Circuit Court's expressed concerns. The Court's instructions require that I identify which factors I have found to be significant and which less so, and why, in determining the managerial status of the faculty.

⁵ As noted by the Court, when deciding whether a particular group of faculty members possess true managerial authority which would exclude them from the protections of the Act, "context is everything." Point Park University v. NLRB, 457 F.3d at 46 (D.C. Cir. 2006).

As discussed below, I have concluded that the full-time faculty are not managerial employees and, therefore, they should be included in the unit. Accordingly, I reaffirm my original decision with respect to the status of full-time faculty members.⁶

I. OVERVIEW OF LEGAL PRINCIPLES

Initially, I will review the Supreme Court's decision in Yeshiva and the Board's recent application of that case in LeMoyné-Owen II. In NLRB v. Yeshiva University, 444 U.S. 672 (1980), the Supreme Court, for the first time, found that faculty members were managers excluded from the Act's coverage. The Supreme Court affirmed the decision of the Court of Appeals for the Second Circuit, agreeing that the facts established that the Yeshiva faculty, in effect, substantially and pervasively operated the enterprise. NLRB v. Yeshiva University, 582 F.2d 686, 698 (2d Cir. 1978). In Yeshiva, the Second Circuit Court of Appeals, which examined the record and related the circumstances in considerable detail, agreed that the faculty were professional employees under Section 2(12) of the Act, but concluded that the Board ignored the extensive control of the Yeshiva faculty over academic and personnel decisions as well as the crucial role of the full-time faculty in determining other central policies at the institution. The Circuit Court concluded that such power was not an exercise of individual expertise. Rather, the Circuit Court found that the faculty were, in effect, substantially and pervasively operating the enterprise.

In determining the managerial status of the faculty at Yeshiva, the Supreme Court noted that both the supervisory and managerial exemptions grow out of the fact that an employer is entitled to the undivided loyalty of its representatives. Managerial employees, defined as those who formulate and effectuate management policies by expressing and making operative the decisions of their employer are "much higher in the management structure than those explicitly mentioned by Congress, which regarded [them] as so clearly outside the Act that no specific

⁶ I am incorporating herein all of the factual findings set forth in my Decision and Direction of Election. As necessary to the analysis herein, this Supplemental Decision will reference, and in some instances, repeat or summarize factual findings from the Decision and Direction of Election in this matter.

exclusionary provision was thought necessary.” Yeshiva, 444 U.S. at 683, quoting NLRB v. Bell Aerospace Co., 416 US 267, 288 (1974).

According to the Supreme Court, the controlling consideration in Yeshiva was that the faculty exercised authority which in any other context unquestionably would have been managerial. The Court observed that, “Their authority in academic matters is absolute.” The faculty decided what courses would be offered, when they would be scheduled, and to whom they would be taught. They debated and determined the teaching methods, grading policies and matriculation standards. They effectively decided which students would be admitted, retained and graduated. On occasion, their views determined the size of the student body, the tuition to be charged and, in one instance, the location of a school.

In Yeshiva, ultimate authority was vested in the Board of Trustees whose members, other than the president, held no administrative positions at the university. The president was assisted by four vice presidents in overseeing the university. Each of the ten individual schools at Yeshiva University was substantially autonomous and each was headed by a dean or director.

Faculty members met formally and informally to discuss and decide matters of institutional and professional concern. Most of the schools also had faculty committees concerned with special areas of educational policy. Faculty welfare committees negotiated with administrators concerning salary and conditions of employment. Through meetings and committees, the faculty at each school effectively determined the school’s curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules.

Specifically, at two of the schools, faculty actions were regarded as “binding,” and no academic initiative had been vetoed in at least the six years before the representation petition was filed. In one of the other schools, the faculty’s disagreement with the dean’s decision to

delete the education major resulted in the reinstitution of the major. In two other programs, all decisions regarding academic matters were made by faculty consensus.⁷

At Yeshiva, the faculty power also extended beyond strictly academic concerns. The faculty at each school made recommendations in every case of faculty hiring, tenure, sabbaticals, termination and promotion. In 98 to 100 percent of the cases, the faculty recommendations were implemented. Faculty at one school even had the authority to pass new and binding policies expanding their role in personnel matters. Faculty at some of the other schools made final decisions on admission, expulsion and graduation of individual students. Others decided teaching loads, student absence policies, tuition and enrollment levels, and in one case, the location of a school.

In Yeshiva, the record did not support a finding that the professional interests of the faculty and the interests of the university were “distinct, separable entities with which a faculty member could not simultaneously be aligned.” The Court, instead, held that in fact “the faculty’s professional interests—as the applied to governance at a university like Yeshiva—cannot be separated from those of the institution.” *Id.* at 688. The Court pointed out that divided loyalty is a particularly acute problem for a university like Yeshiva, noting that Yeshiva and like universities must rely on their faculty to participate in the making and implementation of their policies.

In fact, the Court responded to the dissent’s contention that the authority at modern universities has shifted from the faculty to the administration, by stating that the shift was neither universal nor complete. The Court concluded that it had to base its decision on the record before it which indicated that there was no substantial intermediate level of administrators upon whom the trustees and the president could rely to make informed decisions as to matters left to the faculty.

⁷ Thus, the record in Yeshiva revealed that the deans of the various schools were, to a large extent, subservient to the decisions of the faculty.

The Court recognized that:

[O]ther factors not present here may enter into the analysis in other contexts. It is plain, for example, that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students and supervise their own research. There thus may be institutions of higher learning, unlike Yeshiva where the faculty are entirely or predominantly nonmanagerial. Yeshiva, supra at 690, fn. 31.

On remand from the D.C. Circuit, the Board in LeMoyne-Owen II concluded that the faculty were managerial based on the faculty's authority to effectively control curriculum decisions, determine honors and academic retention at the college, as well as their sole discretion with respect to grades. The Board also noted that the faculty made effective recommendations in several nonacademic areas, especially citing the faculty's authority with respect to recommending tenure.

II. ANALYSIS OF MANAGERIAL DETERMINATION

As indicated in my original Decision and Direction of Election and in accordance with the Supreme Court's teachings in Yeshiva, I find that authority in academic matters is of utmost significance in determining the managerial status of faculty members. In my earlier decision I discussed the structure of the institution wherein the full-time faculty members report to the department chair or program director of the department or program in which the faculty member teaches. The department chairs in turn report to the dean of the school in which the department is located. The deans report to the academic dean also known as the Vice President of Academic Affairs ("VPAA"). The VPAA, along with vice presidents of various other areas, reports to the University's President, who reports to the 35-member Board of Trustees.

In considering whether the full-time faculty are managerial employees I have considered the evidence as to the faculty's authority over curriculum and academic policies, including the extent of their ability to determine what undergraduate and graduate programs are offered, as well as changes to degree programs, including structural changes and all other changes in

course offerings having effects beyond the academic department,⁸ grading, teaching methods, and admissions, retention and graduation of students to be the most significant factors relating to the determination. I have also considered the faculty's authority relating to other academic-related matters such as enrollment levels, the setting of tuition, course scheduling, and academic calendars. Finally, I have reviewed the faculty's authority with respect to nonacademic matters, such as the granting of tenure and sabbaticals, faculty hiring and promotion and input on personnel policies. While authority in these nonacademic areas has some bearing on the managerial determination, it is the least significant factor in determining managerial status. Thus, without effective recommendation and control over academic matters, faculty will not be found to be managerial based on their authority in nonacademic matters.

A. Curriculum and Other Academic Matters

1. University Status

Unlike LeMoyne-Owen II, the record herein establishes that the faculty was not involved with the change in the structure of the institution from having departments to having four schools, each headed by a dean.⁹ Similarly, the faculty did not participate in the application for university status.¹⁰ In LeMoyne-Owen II, when the faculty learned of the administration's plan to

⁸ The functions of the Curriculum Committee, which are set forth in the Faculty Assembly Bylaws, include the review and recommendation "to the Faculty Assembly action concerning structural changes in existing degree programs, and all other changes in course offerings which may have effects beyond the department."

⁹ As noted in my Decision and Direction of Election in this matter, the movement toward school-based governance began in 2002. Prior to that time the Employer's structure consisted of departments headed by a department chair. The Administration, specifically the VPAA and the deans, decided to change the structure to have four separate schools, each headed by a dean and each with a school governance structure.

¹⁰ At page 7 of its Brief, the Employer states that two members of the faculty produced the application for university status. This is a misstatement of the record evidence. As noted at pages 35 and 36 of the Decision and Direction of Election, University President Henderson testified that the Administration worked with "faculty members" Robert Alexander and Vincenne Revilla-Beltran, as well as Associate VPAA Cynthia Liefeld, to produce the application for university status and prepare for a site visit by the PDE. The record established, however, that at the time of their involvement in this application process, Alexander's and Revilla-Beltran's positions were Director of the Honors Program and Department Chair of the Education and Community Services Department, respectively. Thus, they, like Liefeld, were part of the Administration.

collapse the number of academic divisions from five to three, the faculty objected that it had not been consulted. The plan was then delayed for faculty input. After its review the faculty disagreed with the plan. Consequently, the LeMoyne-Owen administration abandoned the plan which had been recommended by the college's provost, and the existing structure remained intact. The instant case is factually closer to St. Thomas University, 298 NLRB 280 (1990), where the Board, contrary to a regional director, found the faculty to be nonmanagerial. There the employer decided, without faculty vote or approval, to restructure the university to overcome financial difficulties. The structural changes included reducing the number of divisions from nine to five and creating one new division.

Here, not only were the faculty excluded from the academic consequences that flowed from the Administration's decision to seek university status, but their input on academic matters became more diluted as the Administration added even more administrators to its substantial administrative staff.¹¹ After the restructuring of the institution, the Administration had not one, but two, buffers between it and the faculty. The department chairs and all but one program director¹² were one buffer and the newly-created deans comprised a second buffer. In addition to the department chairs, program directors and deans, the Employer here also has a myriad of other administrators which operate the college. In this respect, the Employer's organizational hierarchy is similar to that discussed in Loretto Heights College, 264 NLRB 1107 (1982), where

In addition, although President Henderson contended at the hearing that she invited faculty participation in the process to attain university status at a Faculty Assembly meeting, the record revealed that Henderson met with the Faculty Assembly in the spring of 2002 and informed them that the Employer's application for university status had been completed. When one of the faculty members questioned the Employer's taking those actions without discussions with the faculty, Henderson effectively dismissed the question, citing time constraints and the fact that another local college had also applied for university status.

¹¹ Thus, the record shows that four deans were added to the group of at least 16 other administrators for a total of at least 20 administrators. Thus, there is a 1 to 4 ratio of administrators to the full-time faculty whose managerial status is in dispute.

¹² In my Decision and Direction of Election, I found that all but one of the program directors were supervisory employees who were therefore excluded from the unit. The one program director whose status could not be determined was a newly-hired program director in the new program of Masters in Criminal Justice.

the faculty was found to be nonmanagerial based in large part on the fact that the college was really operated by the large number of administrators, including the group of program directors who provided an effective buffer for the administration. Likewise, in St. Thomas University, supra, the chain of command above the petitioned-for unit of faculty members consisted of division chairpersons, the dean of the faculty, the vice president of academic affairs, the university president, and the Board of Trustees. Cf. Elmira College, 309 NLRB 842 (1992) (Faculty found to be managerial reported directly to the Dean of the Faculty [the position occupied by VPAA Stevens in this case] on academic and non-academic matters.); Duquesne University, 261 NLRB 587 (1982) (The law school's chief executive officer was its dean, who was also an instructor, and the law school had no departments or department chairpersons.)

2. Program Offerings

The governance structure of the Employer is described in the Decision and Direction of Election in this matter, including the role of the Board of Trustees and its committees,¹³ the Administration and its committees,¹⁴ and the Faculty Assembly and its committees. The Curriculum Committee, one of the committees of the Faculty Assembly, exists to “recommend to

¹³ The Point Park College Bylaws vest the Board of Trustees with ultimate authority to manage and govern. The Board of Trustees also has paramount authority in academic matters. Among the enumerated authorities in the Bylaws are several which relate to academic matters, including the power to establish, review and approve changes, including discontinuances, in the Employer's educational programs. The Bylaws provide that, “For decisions that affect programs, curricula or faculty, the Trustees *should* seek responsible and timely input from the academic departments and faculty affected. The process *should* begin with a meeting of the President, the Vice President for Academic Affairs and the chairs of the affected departments. *It is the responsibility of these parties to determine the process upon which these decisions will be made.* In case of program discontinuances, *consideration* will be given to the procedures described in the Faculty Handbook (27.2).” (Emphasis added.)

¹⁴ The Faculty Handbook dated September 1, 2000, which provides that the faculty will conduct its business through the Faculty Assembly, states that while the role of the faculty is profoundly respected, especially in academic matters, the policies and determinations of the Board of Trustees, after consideration of faculty views, constitutes final authority in all matters. The Handbook further provides that the Board of Trustees appoints the President, who is the chief executive officer of the institution. Finally, the Faculty Handbook at Section 6.1 recognizes that the functions of the Faculty Assembly appear in the Faculty Assembly Bylaws. As noted in LeMoyné-Owen II, the Faculty Handbook is the basic document governing relations between the faculty and the Administration.

the Faculty Assembly the adoption of new courses,¹⁵ programs and majors” and to “review and recommend to the Faculty Assembly action concerning structural changes in existing degree programs, and all other changes in course offerings which may have effects beyond the department.” The Faculty Assembly in turn makes recommendations to the Administration.

The process by which an undergraduate program comes into being is set forth in my Decision and Direction of Election. The record reflects that as to the creation of undergraduate programs, the faculty certainly does not have absolute or effective control. There are instances in the record where, after the program is approved by the Faculty Assembly, the Administration determines that the program should not be offered based on the results of a market study, the need for which is unilaterally determined by the Administration, or based on some other concerns relating to lack of enrollment.

Specifically, the record establishes that the Faculty Assembly approved a program in Construction Management, and the Administration determined that the program would not be offered. Likewise, programs in Vocal Performance and in Counseling were abandoned based on results of a market or feasibility study initiated by the Administration without faculty input as to either the need for such studies or as to the results of the studies. In addition, one undergraduate program in Sports, Arts and Entertainment Management (SAEM) was offered without going through the required approval process. Thus, the outcome of 4 out of 14 undergraduate programs, or approximately 29 percent of the undergraduate programs about which there is evidence in the record, was not decided upon by the faculty.

¹⁵ At page 26 of its Brief, the Employer states, citing pages 172 to 174 of the transcript, that the undersigned “erred in failing to give consideration to the fact that the core curriculum subcommittee of the Curriculum Committee of the faculty rejected Administration proposals to make changes to the University’s core curriculum.” A review of the transcript reveals that the Employer is misstating the record evidence. VPAA Stevens testified that 2 to 3 years prior to the hearing, the Core Curriculum Committee did an assessment of the core, and there were some concerns about changing a couple of the classes. In the end, the Committee recommended that no changes be made and no changes were made by the University. There is absolutely no evidence that the Administration proposed any changes to the core curriculum or that the Administration acceded to the view of the core curriculum subcommittee contrary to its own view.

In Yeshiva, the Supreme Court acknowledged the occasional vetoes of faculty action based on administrative concerns with scarce resources and university-wide balance, but noted that such infrequent administrative reversals did not detract from the institution's primary concern with the academic responsibilities entrusted to the faculty. Yeshiva, supra at 689, fn. 27.

The Administration's actions as to undergraduate programs constitutes more than a "rarely-exercised veto," and while the Administration accepts the faculty actions with which it agrees,¹⁶ there is no evidence in the record that the Administration acceded to the will of the Faculty against its own wishes as to any of the other undergraduate programs offered since 1998.

Of the six new graduate programs proposed since 2000, the Administration implemented five of them. The faculty approved a sixth graduate program, the M.S. in SAEM, but the Administration did not offer this program, instead adding it to the curriculum as an undergraduate program. Accordingly, the record shows that the faculty's recommendation as to graduate programs was not followed nearly 17 percent of the time.¹⁷

Notwithstanding that the Curriculum Committee is charged with recommending the adoption of new courses and with reviewing and recommending actions concerning structural changes in existing degree programs, the record establishes that in the two years before the filing of the petition in this matter, the Administration made several changes in course offerings and made structural changes in existing programs without faculty input or approval. Those changes are set forth in detail in the Decision and Direction of Election and will be summarized here.

¹⁶ Clearly the Administration agreed with offering the Cinema and Digital Arts program as the record establishes that this program was proposed by the Administration.

¹⁷ The handling of the SAEM program affected the faculty's role with respect to both undergraduate and graduate programs.

One of the structural changes implemented by the Administration without the participation of or approval by the Curriculum Committee or the Faculty Assembly occurred in 2001, when the Administration dismantled the Government and International Studies (“GIS”) Department which had been in existence for at least 15 years.¹⁸ At that time, the GIS courses in public administration and economics were shifted to the Business Department, and political science and history were reassigned to the Humanities Department. Thus, the change involved a matter that should have been considered by the Curriculum Committee in that it involved “effects beyond” the GIS Department. Specifically, the Business Department and the Humanities Department were required to offer additional courses which had previously been offered by the GIS Department. The faculty was not consulted regarding the dismantling of the GIS Department, even though this type of action is exactly the type of action which the Faculty Assembly Bylaws state must be considered and recommended by the Curriculum Committee.

Similarly, when a structural change in an existing degree program is contemplated, the Faculty Assembly Bylaws require that the issue must be presented to the Curriculum Committee of the Faculty Assembly for a vote. The process was again ignored in 2001 when the Administration merged the International MBA program (“IMBA”) and the MBA programs. The IMBA program had been an existing program for 17 years when the Administration merged the program into the MBA program.

In about 1996 the Employer began offering an accelerated MBA program in order to increase student growth, and enrollment in the MBA program did increase quickly. At about the same time, the \$3,000 per year advertising/marketing budget for the IMBA was transferred from

¹⁸ The Administration’s actions could be characterized as either a structural change or a discontinuance of the GIS Department. The Faculty Handbook contains the policy adopted by the Employer as to the discontinuance of all programs and/or departments of instruction. At Section 27.2 the Handbook states that, “The decision to discontinue formally a program or department of instruction will be based essentially upon educational considerations, as determined primarily by the faculty as a whole or an appropriate committee thereof. (NOTE: Educational considerations do not include cyclical or temporary variations in enrollment. They must reflect long-range judgments that the educational mission of the institution as a whole will be enhanced by the discontinuance.)”

the control of the program director and given to Judith Bolsinger, then Dean of Part-Time and Accelerated programs. According to Dimitris Kraniou, the former IMBA program director, the Employer's decision to cease marketing and recruitment for the IMBA eventually led to declining enrollment, which ultimately led to the Employer's decision to discontinue the program.

In about April 2001, the Pennsylvania Department of Education notified the Employer that its certification for the IMBA did not cover the accelerated MBA program. Consequently, the Administration determined that it would not continue to offer these programs. By this time the majority of the students were enrolled in the accelerated MBA program, and the Administration decided to merge the IMBA into that program.¹⁹ The Administration also determined that it would offer three tracks, or concentrations, one being a concentration in international business.²⁰ This change was effectuated. The IMBA program was no longer offered, and a new MBA degree program listing required core courses and the courses offered in each of the three concentrations was published in the 2002-2003 graduate catalog.

Now the international business track contains only four of the courses that had been part of the IMBA program.²¹ All but the four remaining courses were eliminated by the Administration. Contrary to the "requirements" of Section 27.2 of the Faculty Handbook, the discontinuance of the IMBA program was not presented to the Curriculum Committee, the Faculty Assembly, or the Faculty Council.

In 2001 the Employer opened the Innocence Institute of Western Pennsylvania, a project created to examine allegations of wrongful convictions. Notwithstanding the fact that the Innocence Institute resulted in new curriculum and independent study opportunities in

¹⁹ The record does not reflect whether the Administration obtained a separate certification for the AMBA program.

²⁰ The other two tracks are the management information systems track and the management track.

²¹ Prior to the discontinuance of the IMBA there were 26 course offerings (7 core courses, 13 electives and 6 international studies component courses) from which a student could obtain the 39 credits required to complete the IMBA degree program.

investigative journalism, the faculty was not given the opportunity to consider the establishment of the Institute. President Henderson's²² view is that because the Innocence Institute was made part of the Journalism and Mass Communications Department the faculty need not consider the matter.

In 2002, President Henderson decided to contract with Berlitz/ELS Educational Services, Inc. Prior to 2002, the Employer had a program called English as a Second Language ("ESL") which was part of the Humanities and Human Sciences Department.

The Department Chair of the Humanities and Human Sciences Department objected to the Administration's actions with respect to contracting with Berlitz/ELS and the anticipated consequent demise of the ESL program. At the hearing, Henderson admitted that there were fewer ESL courses offered, but maintained that the program had not been discontinued.²³ Even assuming that the ESL Program has not been formally discontinued, Henderson's stated view is that the issue of ceasing to offer certain courses need not go before the Faculty Assembly if the courses, like the ESL courses, do not carry academic credit. However, neither the Faculty Handbook nor the Bylaws of the Faculty Assembly make any distinction between courses and programs which carry or do not carry academic credit. The ESL program was part of an academic department and the program included classes attended by students. Notwithstanding Henderson's opinion, the ESL program, which taught English to international students, is an academic matter which the Administration affected when it unilaterally decided to contract with Berlitz/ELS.

²² At footnote 4 of its Brief, the Employer improperly includes assertions regarding the retirement of President Henderson and the identity of her successor. Events transpiring after the hearing are not part of the record.

²³ No other information was provided by the Employer as to the number of ESL courses remaining or the enrollment in those classes. Henderson's testimony was, however, rebutted by faculty member Edward Meena, a witness called by the Petitioner. Meena testified that the ESL program was "discontinued".

The record contains an additional example of a change in two existing degree programs in 2002 that apparently occurred without a recommendation of the Curriculum Committee or a vote of the Faculty Assembly.²⁴ Prior to the fall of 2002, students seeking a bachelor's degree in the programs of Early Childhood Education and Elementary Education were required to take *either* EDU325, Multi Cultural Diversity Issues, *or* EDU326, Special Education Inclusion. When the faculty returned in the fall of 2002, the program guide had been changed such that students were required to take *both* of these courses to complete *each* of these programs. The full-time education faculty were unaware that this change was planned. When one of the department professors, Darlene Marnich, requested that then-department chair Dr. Revilla-Beltran provide minutes or other documentation regarding the change. Revilla-Beltran responded that having moved offices, she could not find any of the documentation.

Marnich, also a member of the Curriculum Committee, recalled no proposal for such a change ever being submitted to the Curriculum Committee, and her search did not reveal any minutes to show that the Curriculum Committee reviewed this proposed change. The requirements that both EDU 325 and EDU 326 be completed in both the Early Childhood Education Program and the Elementary Education Program continue to date.

Finally, in 2002, the Employer decided to revamp its Honors Program. The National Collegiate Honors Council was invited to Point Park to review the Honors Program. After the October 2002 visit, the Honors Council recommended that the Employer offer a ten-course core curriculum that is separate from the college's core curriculum. The Administration decided not to adopt the ten-course curriculum. However, the recommendation made by the National Collegiate Honors Council was not submitted to or shared with the Curriculum Committee or the

²⁴ In addition, as detailed in the Decision and Direction of Election, the Administration disregarded the process by which a special topics course becomes a regular course by designating the special topics Freshman Seminar, a course developed by Assistant VPAA Cynthia Liefeld, as a required course for all degree programs before it was reviewed and recommended by the Curriculum Committee and the Faculty Assembly.

Faculty Assembly for consideration.²⁵ If the faculty had true managerial authority it should have been consulted on whether to heed the recommendation of the National Collegiate Honors Council. The determination to either ignore or accept the recommendation was an academic matter. Here again the Administration chose to make the determination without respect for the role of the faculty.

As noted in the Decision and Direction of Election, the Administration's inclination to unilaterally restructure departments is particularly noteworthy because, according to the testimony of President Henderson and VPAA Stevens, it is the academic departments that are at the core of developing new programs in that departments determine whether to propose programs and/or courses. However, the record reflects that the Administration has exercised its ability to alter the configuration of academic departments without any faculty input when it suits the administration to do so.

In LeMoyne-Owen II, the college president testified that he had never, in six years as president, failed to approve a faculty recommendation on degree requirements or other matters related to the courses taught at the college. In addition, the evidence established that the president forwarded all faculty assembly recommendations on curricular changes to the board of trustees without exception, and that the trustees never rejected any of these recommendations.

In addition, although a special committee was formed at the suggestion of the president to examine the college's core curriculum offerings and to make other proposals, the faculty was

²⁵ The Employer asserts at page 26 of its Brief that the curriculum changes recommended by the National Collegiate Honors Council were not submitted to either the Curriculum Committee or the Faculty Assembly because of faculty criticism. There is no support in the record for this assertion in either the transcript pages 1123-1124 or Union Exhibit 72, which were cited by the Employer. To the contrary, VPAA Stevens testified that it was **not** the Administration's intention to implement the recommendation for curriculum changes made by the National Collegiate Honors Council, and further that none of the four recommendations made by the Council was submitted to the Faculty Assembly or any subcommittee for a vote. Three of the four recommendations made by the National Collegiate Honors Council were in fact implemented by the Administration. Those recommendations were that the honors program be administered independently, that there should be an honors program director who would report to academic affairs and that the program have its own space.

aware of the special committee's deliberations through faculty representation on that special committee. In any event, the only evidence of any change emanating from the committee was the committee's recommendation to increase the number of credit hours that students must devote to core curriculum courses. The Board noted that there was no evidence that this recommendation was implemented without first being considered and approved by the faculty assembly, which had to approve all core curriculum changes.

In LeMoyne-Owen II it was the faculty which approved the elimination of a graduate program in the education division, changes in the accelerated degree program in the business division, a new childhood education major, and an expanded curriculum in the honors program. There the administration implemented all of these changes.

In American International College, 282 NLRB 189 (1986), a case heavily relied on by the Employer, where the petitioned-for unit positions of full-time faculty and department chairmen were found to be managerial, the record established that the faculty proposed all new graduate and undergraduate degree programs and that these proposals were uniformly implemented by the administration. The faculty established major fields of study, modified course requirements and added and deleted course offerings, all of which the administration approved.

The faculty also decided to join the natural science department with the biology department, which resulted in the addition and elimination of courses, changes in course descriptions and modifications in the required freshman courses. In the school of arts and sciences, the faculty discontinued course prerequisites on its own accord, as well as the foreign language prerequisite for graduation. The psychology and education departments were merged by the faculty to form the school of psychology and education. In the school of business administration, the faculty established a major in business studies and information systems management, and a one-year MBA was subsequently expanded to a two-year program. Unlike Point Park's Administration-driven dismantling of the GIS department and the transfer of its courses to either the Business Department or the Humanities Department, the merger of the

IMBA into the accelerated MBA program and the resulting elimination of the vast majority of the IMBA program courses, the addition of the Berlitz/ESL program and effective discontinuance of the ESL program, the opening of the Innocence Institute, and the addition of a course to both the Early Childhood Education and Elementary Education programs, the curricular changes discussed in American International College were developed by and passed upon by the faculty with no involvement by the administration except to approve the final faculty determination.

In Elmira College, the Curricular Affairs Committee was responsible for reviewing and making recommendations to the faculty concerning changes in academic programs and in major and minor fields of study. The record there revealed that from 1982 to 1983, which was more than five years prior to the hearing, the previous college president announced the creation of a core curriculum which had not been voted on by the faculty. However, during the four-year tenure of the college president serving as of the time of the hearing, all recommendations of the Curricular Affairs Committee had been approved.²⁶ See also, Livingstone College, 286 NLRB 1308 (1987)(Faculty had almost complete control over curriculum where all curriculum changes had to be approved by the faculty-dominated curriculum catalog committee); Duquesne University, supra, (Bylaws required the dean to obtain the consensus of the faculty in academic matters.)

3. Academic Policies

Another area where the Administration has acted without regard to the faculty's input is in implementing academic policies. According to Section 28 of the Faculty Handbook, the faculty, through the academic departments, is responsible for the development, delivery, maintenance and evaluation of curricula of the University. Despite the faculty's purported

²⁶ At footnote 21 of its Brief, the Employer cited Elmira College as support for the proposition that even where an administration established and implemented an entire core curriculum without the approval of the faculty, the Board found the faculty had control over the curriculum. This is a misstatement of the Board's findings. The Board specifically relied on the fact that during the four years prior to the hearing, all of the recommendations of the Curricular Affairs Committee had been approved.

responsibility in the area of the delivery of the curricula, the Administration, through the Deans Council²⁷ and the VPAA, determined academic policies relating to the delivery of course offerings. The Administration did not submit these policies to the faculty.

The record reveals that the Administration has unilaterally, and in derogation of the faculty's rights and responsibilities described in the Faculty Handbook, developed policies relating to on-line courses, special delivery courses, independent study and faculty led trips abroad.

On April 16, 2003, the VPAA sent a memorandum to the faculty concerning the Employer's plan to offer on-line courses for the fall of 2003. The memorandum indicates that a stipend of \$1500 would be paid to faculty members for developing full on-line courses. Admittedly, the proposal for on-line courses was not submitted to the Curriculum Committee or to the Faculty Assembly.²⁸ At the hearing, the justification that VPAA Stevens offered was that online courses merely changed the method of delivery, but not the content. This justification is shown to be contrary to the directives of the Faculty Handbook.

With respect to special delivery courses,²⁹ the Employer added a requirement that faculty add 14 hours of activities outside of the classroom so that these three credit courses would meet the Pennsylvania Department of Education ("PDE") requirement of meeting for 42 hours.³⁰ It appears from the record that the supplemental activities were determined by Associate VPAA Liefeld and the deans. This matter of determining the type of supplemental activities was not presented to the Faculty Assembly for a vote.

²⁷ The Deans Council is comprised of the four academic deans of the four undergraduate schools, the Director of Library and the Director of the Honors Program. The four undergraduate schools are: the School of Arts and Sciences, the School of Business, the Conservatory of Performing Arts (COPA) and the School of Adult and Professional Studies.

²⁸ Although the Employer implemented the on-line courses, there were no enrollments.

²⁹ Special delivery or special format courses are those which are offered on a time schedule which allows the student to take two courses in one time slot by selecting courses which meet on alternate weeks.

³⁰ Previously, these courses met for 28 hours a term.

In the fall of 2003, the Deans Council decided to change the policy for independent study courses by requiring that the deans approve all student requests for independent study and that such requests be accompanied by a course syllabus and a work and meeting schedule.

Moreover, pursuant to the new policy, faculty could no longer offer independent study options for courses already existing in the schedule to students whose schedules did not permit them to enroll in the course at the time it was scheduled to meet. These changes in the policy for independent study courses were not presented to the Faculty Assembly prior to implementation.

Similarly, in 2003, VPAA Stevens suspended all faculty-led trips abroad due to problems caused by faculty members planning and booking trips without proper authorization.

The Deans Council subsequently decided that it would not reconsider its decision not to support faculty-led trips abroad until the International Assessment Project (“IAP”) Group process was implemented. The process promulgated by the Deans Council required prior approval by the dean of the appropriate school of the intent to develop a study abroad program, as well as the submission of substantial curricular materials, including a syllabus, for review and final approval by the VPAA prior to any marketing or student recruitment. The Deans Council guidelines also included its preference of having approval for summer programs made no later than October of the previous calendar year. The suspension of the faculty-led trips abroad and the guidelines for a new process were not submitted to the Faculty Assembly.

The Employer’s refusal in this case to follow the Faculty Handbook and to consult the faculty on academic policies is quite different from the administration’s treatment of the faculty in American International College, supra. There, amendments to the academic regulations of the college were proposed and presented through the faculty committee on academic standards and student advising. This committee presented proposed modifications to the entire faculty. None of the changes passed by the faculty had been overridden by the administration. In one instance, the administration opposed a modification requiring final exams at the end of each semester and directed the faculty to refrain from giving a comprehensive exam during the last

week of fall classes. Nevertheless, the faculty approved the change to have exams at the end of each semester and this change was implemented.

4. Discontinuance of Programs

The Faculty Handbook includes the Board Policy on Educational Programs and Program Discontinuance. This policy provides: “The discontinuance of a program or department will be based essentially upon educational considerations, as determined primarily by the faculty as a whole or an appropriate committee thereof.”

In October 2001, the VPAA recommended to the Curriculum Committee that 43 programs be discontinued as they had been under-enrolled since 1996. The Curriculum Committee recommended to the Faculty Assembly that 13 of those programs be discontinued and the Faculty Assembly approved this recommendation. The Administration then deleted those 13 programs from the catalog. The other 30 programs remained in the Employer’s catalog. I recognize that in this instance it appears the Administration did not override this decision of the faculty.³¹ However, it appears that the only reason for the Administration’s proposal was low enrollment as opposed to any judgment that the educational mission of the institution as a whole would be enhanced by the discontinuance of selected programs.³²

5. Admissions

The record establishes that the Employer’s admissions policy for full-time undergraduate students is published in its catalog.³³ The genesis of these standards is unknown, according to

³¹ This instance is inconsistent with many other instances in the record and it will be viewed and analyzed in the context of the entirety of the Administration’s actions vis-à-vis the faculty in reaching my conclusion herein.

³² As noted above, the Administration circumvents this Faculty Handbook provision when it feels necessary. By taking the position that the actions taken with respect to the GIS Department, the MBA program and the ESL program did not constitute formal discontinuance, the Administration overcame the need for faculty involvement and approval.

³³ The minimum admission standard is a 2.5 GPA and an 860 SAT/18 ACT score. Transfer students must have maintained at least a 2.0 college GPA.

VPAA Stevens. George Bromall, a 33-year faculty member, testified that he was unaware of any faculty input into the promulgation of these standards.

It appears that the structure of the Employer's Admissions Office has changed since Henderson assumed the presidency. Formerly, there was a position called Dean of Admissions. As noted above, Henderson split this position such that currently the Employer has two enrollment deans. In 2002, Henderson decided that instead of having the enrollment deans report directly to her, the enrollment functions should be overseen by the Vice President of Finance and Operations.

In addition to the general undergraduate admissions standards, there are other standards for graduate programs and accelerated programs.³⁴ There is conflicting evidence in the record as to whether the faculty had input in developing the admissions standards for graduate and accelerated programs.

President Henderson testified without specificity that faculty establish admissions standards for their programs. Dean of Adult and Professional Studies Bolsinger also testified generally that admissions criteria for the accelerated programs are established by the department. John P. Gobble, Sr., a witness called by the Employer, has been the director of the undergraduate Criminal Justice Program since its inception in 2002. This program is offered on both an accelerated and non-accelerated basis. Unlike the non-accelerated program, which is part of the Humanities and Human Services Department, the accelerated program is housed in the School of APS under Bolsinger's direction. Gobble testified that he believed Bolsinger determined the admission standard for presumptive admission³⁵ for the accelerated program.

³⁴ Accelerated programs are also referred to in the record as Saturday Fast Programs.

³⁵ In this program, those with a GPA of 2.5 are presumptively admitted. The presumptive admission means that having attained the specified grade point average, the applicant is admitted without the program director reviewing the application and supporting documents.

The MBA Program is now offered as both a non-accelerated and an accelerated program. The initial standard for being presumptively admitted or automatically denied in the accelerated MBA program was a GPA of 2.75 or 2.0, respectively. Within his first month as the MBA program director,³⁶ William Breslove met with Dean Bolsinger and then-department chair Bromall. During the meeting, it was determined that a student with a GPA of 2.5 to 2.75 should be automatically admitted on a probational basis, and that any applicant with a 2.0 to 2.4 should be denied admission, but would be given the option of contacting the program director to explain why their GPA was not indicative of their likelihood of success. All of those students who opted to speak to Breslove were given the opportunity to take one to two undergraduate classes. If the student demonstrated proficiency in the two undergraduate classes by earning a grade of B or above, the student would then be admitted to the MBA Program.

Breslove denied that this system was arrived at as a collective decision. Breslove felt that the process resulted from enrollment quotas given to Bolsinger by Henderson. According to Breslove, Bolsinger had described these enrollment quotas to the business department faculty in a department meeting.

Admittance into COPA requires that a student meet the general admission requirements of the university and that he/she audition before a group of full-time and adjunct faculty members.³⁷ Each faculty member of the group completes an audition form to evaluate each auditioning student. The most proficient students will be accepted into the program. The faculty members' evaluation of applicants is based on their individual expertise and training in the art form being evaluated. No information was provided as to the method by which auditions became part of the admission requirements for COPA. In this regard, I note that COPA's 95 adjunct faculty, who do not participate in the Faculty Assembly and who are not asserted to be

³⁶ I found this position to be supervisory and excluded from the bargaining unit in my original Decision and Direction of Election in this matter.

³⁷ It also appears that the Administration has set enrollment goals for COPA.

managerial herein, outnumber the 23 full-time faculty members teaching in COPA by approximately 4 to 1.³⁸

One of the faculty's responsibilities set forth in Section 28.1 of the Faculty Handbook is to establish standards of admission to major programs beyond the minimum established by the Curriculum Committee. The Administration did not allow the faculty to set standards above the minimum, let alone establish the minimum standards, as evidenced by the Administration's lowering the minimum admissions standards in the graduate Criminal Justice and MBA programs without faculty input.

As discussed previously, the faculty's role as to admissions is unlike the role of the faculty in LeMoyne-Owen II, where the faculty created the admission standards, which were recommended to the board of trustees. Similarly, in Duquesne University, supra, the faculty determined admissions requirements, including grade point average and LSAT scores required for admission, and determined the level of competency necessary for students to remain in school.

In Elmira College, supra, the faculty was found to be managerial even though it lacked final authority as to admissions. However, in that case the faculty-dominated Educational Standards Committee had final authority for admission or rejection from 1987 to 1989. In 1989, that Committee and the administration agreed to a procedure whereby the Committee no longer had final authority concerning questionable applicants. Thus, the procedure was not unilaterally mandated by the administration, but was a product of the faculty's exercise of its discretion, through its participation on the Educational Standards Committee.

6. Grading

As to grading, the record establishes that in about 1999 the Faculty Assembly rejected a plus/minus grading policy favored by the Administration. The Administration did not accept this

³⁸ There is no evidence that the full-time faculty constitute a majority of the auditions committees.

determination by the faculty. In 2003, the Administration determined that each of the four individual schools would vote on this issue, and only COPA voted in favor of the plus/minus grading policy. Once again, rather than allow the decision to stand, the Deans Council decided, without faculty input, that the plus/minus grading policy at COPA would be a “pilot program” for the new system. Cf. Yeshiva, supra, (Faculty determined grading system); Duquesne University, supra, (Faculty which Board found to be managerial established the grading system for the law school.)

The record also contains evidence that the Administration has changed grades issued by full-time faculty members without following the student grade appeal procedure. In one case, without convening a committee, VPAA Stevens directed the registrar to change a student’s grade in a graduate MBA course from a B- to an A. In another case, the VPAA directed the registrar to recompute a graduate business student’s average³⁹ in order for the student to have a 4.0 GPA. VPAA Stevens told the registrar that if one class could have been entered as an A+, the student’s overall average would have been a 4.0. Notably, then as now, the plus/minus grading system had not been accepted by the Faculty Assembly when Stevens ordered this recomputation.

VPAA Stevens also changed the grades of about 18 students in a class taught by a member of the Business Department faculty. In this instance, a committee chaired by the program director recommended the grade changes. Stevens reviewed the matter, agreed with the committee and ordered the grade changes. This did not comport with the Faculty Handbook, which has an elaborate procedure for the student appeal of grades. The Handbook provides that after the department committee deliberations, the department chair has the authority to either sustain the grade or ask the instructor to change it within 30 days. Apparently the instructor involved in this incident did not accede to the request because the matter went to Stevens. According to the handbook, when such a matter reaches the VPAA, a grievance

³⁹ The registrar did not agree with changing the GPA. Upon Stevens' insistence, the registrar relented.

committee with the VPAA as the chair is to be convened and the hearing is to be conducted in accordance with the Handbook provisions. Stevens did not convene a grievance committee in accordance with the procedure set forth in the Handbook. Instead, he determined that the grades should be changed. The record contains evidence of another instance of a grade change by Stevens, but Stevens could not recall the specifics of the incident.

As discussed more fully below in the subsection entitled "Syllabi," in 2003 the Administration mandated that syllabi include attendance and grading policies which further eliminated faculty members' discretion as to grading. Thus, faculty members must decrease student grades by a set number of points for missing a specified number of classes, and reduce students by one full letter grade "without exception" for all late assignments.

Finally, the record reflects that prior to 2004, the VPAA had warned faculty members on two occasions that they should not issue too many A's. In January 2004, President Henderson informed the faculty that the grades they issued had been reviewed. The Administration then decreased the merit pay bonus by \$1,000 of those faculty members who issued more A's than the Administration felt was appropriate. The Faculty Assembly had no input regarding this decision.

The instances of the Administration's involvement with grades, including changing grades given by faculty members, refusing to accept the results of the faculty vote on a plus/minus grading system, recomputing a grade-point average, failing to convene a grievance committee in accordance with the procedure in the Faculty Handbook before changing the grades of 18 students, issuing grading policies to be followed in the design of syllabi and decreasing a merit pay bonus of faculty who issued more A's than the Administration felt was appropriate establish that grading is not within the sole discretion of the faculty.⁴⁰

⁴⁰ The record also contains evidence regarding an incident referred to as the grade scandal where an employee in the registrar's office changed grades of 8 to 12 students for financial and/or social favors. Questions as to the status of the grade scandal were raised at the Faculty Assembly meetings, but the Administration refused to share any information with the faculty. The Administration also directly handled the matter with respect to the employee in the registrar's office, the results of which were also not shared with the Faculty Assembly. The grade scandal was widely discussed at the Faculty Assembly meetings in October and November of 2002. According to Professor Marnich, the faculty objected both that the

It is well established that the authority to evaluate students will not, without more, establish the managerial status of professors. However, where faculty have been found to be managerial, they generally possess sole authority as to grading. See, e.g., University of Dubuque, 289 NLRB 349(1988) (faculty had exclusive right to set student grading); Boston University, 281 NLRB 798 (1986), enfd. 835 F. 2d 399 (1st Cir. 1987) (faculty had absolute control over grading); LeMoyne Owen II, supra, (faculty had sole discretion over grading); Duquesne University, supra, (Bylaws required that faculty members have full academic freedom in classroom matters such as grading and course content.)

Unlike the evidence in LeMoyne-Owen II, the record in this matter shows that the faculty do not have sole authority as to the grading of students. There, the Board noted that grading was within the sole discretion of the LeMoyne-Owen faculty, including the discretion to reduce grades for unexcused absences and late work. Student objections to grades were resolved by the faculty, being first considered by the individual faculty member, then by the division chair, and, if necessary, by a faculty committee. The Board specifically relied on the testimony of a 38-year faculty member and former division chair who testified that he had never heard of an instructor's grade being altered by the administration. Similarly, in Elmira College, all grading decisions were left to the individual faculty members. The only appeal a student could undertake was to the faculty-controlled educational standards committee which consisted of 5 faculty members, the dean of the faculty and the registrar.

Administration hired outside auditors to investigate the scope of the scandal and that faculty had no role in imposing sanctions. President Henderson told the faculty that they could "e-mail suggestions". At one of the meetings, a faculty member suggested that all of those involved should be expelled. Henderson explained that such action would cost too much money. Henderson also dismissed the notion that this matter should be addressed openly and could not be hidden. Faculty Assembly President Breslove also questioned VPAA Stevens regarding how many students were involved and what discipline was issued. Stevens told Breslove that it was none of his business and that Breslove did not want to know. Stevens added that the haphazard fashion in which the records were kept made it difficult to know which grades had been changed illegally.

7. Syllabi

On June 30, 2003, VPAA Stevens issued a memo to the full-time faculty advising them that the Employer would award four units of work for a three-credit graduate course only if the course syllabus met the PDE standards. Apparently, the PDE university status site visitors were concerned that the syllabi for graduate courses did not introduce sufficient rigor, research, library assignments and bibliography. Stevens noted that the syllabi for accelerated courses (MBA courses, especially) did not fully, or in some cases even minimally, meet the hourly requirements for out of class work to satisfy the PDE standard of 42 total in-class hours for a three-credit course. Stevens further advised the faculty that the Administration was implementing the syllabus requirement as of the fall of 2003. The memorandum also advised the faculty that syllabus workshops were to be conducted during the summer for full-time faculty and adjuncts. These workshops were, in fact, held.

By letter dated August 4, 2003, faculty members were provided with a detailed model syllabus developed by the Administration for the redesign of syllabi for fall classes. Stevens also set the deadline for submission to the school dean of all syllabi for fall courses. Prior to this directive, the faculty was required to prepare a syllabus for each course, but no requirement of a particularized format existed. The letter further advised faculty that, based on the PDE's university status report, the "most immediate requirement for faculty is a syllabus format required for all courses offered in an accelerated or other special format." The faculty were, for the first time, *required* to assign library work and research for all students. In addition, new attendance and grading policies were outlined which required decreasing student grades by a set number of points for missing a specified number of classes, and reducing students by one full letter grade "without exception" for all late assignments. Faculty were directed to "include a course outline, by day by week, of assignments, presentations, readings, exams, etc."

The Employer advised faculty of the requirements to be met in order to receive four credits of teaching load, and imposed syllabi requirements, which included attendance and

grading policies, without first presenting the issue to the Faculty Assembly or any of its committees.

Lack of control over syllabi and attendance policies is relevant in determining that faculty lack managerial authority. For instance, in St. Thomas University, supra, the Board noted that, unlike Yeshiva, the faculty did not have extensive authority in academic areas inasmuch as they had to prepare course syllabi and select textbooks in consultation with the division chair. The administration also recommended that no more than three unexcused absences be permitted, and faculty could not change grades without the approval of the dean of the faculty. The Department Chairpersons Committee also ordered faculty to require students to write two essays in every course despite the faculty committee's refusal to adopt this requirement. To the contrary, in LeMoyne-Owen II, supra at 8, the Board noted that there was no evidence of syllabus revisions being required by the administration.

8. Teaching Loads

The standard teaching load for full-time faculty is 12 semester hours consisting of four three-credit courses. The record indicates that this has been the standard for many years and there is no information as to how the teaching load was originally determined. In the fall of 2003, the Administration, in response to a recommendation following a visit of a PDE site team, increased the load factor for graduate courses such that a three-credit graduate course counts for four credits of load.⁴¹

Teaching additional courses over the normal teaching load of 12 credits per semester is referred to as an overload. Faculty members teaching an overload course receive additional compensation for each course taught. President Henderson testified that when she arrived at the institution, faculty were teaching an “unconscionable” number⁴² of overload courses which

⁴¹ In this way, the faculty who teach only graduate courses have a teaching load of three courses but are still paid for four courses.

⁴² According to Henderson, faculty members were teaching three to five overloads a semester.

was severely impacting the quality of teaching. The Administration limited the number of overload courses faculty could teach two to three years ago, such that faculty was limited to one overload course in each of the fall and spring semesters and a maximum of four courses during the combined summer semesters, subject to the approval of the VPAA. This limitation was then included in each faculty member's annual employment agreement.

VPAA Stevens confirmed that faculty members cannot teach a second overload course in the fall or spring unless he approves it. Although the Faculty Assembly objected to any limitation on overloads, Stevens felt that the policy he implemented was a compromise.

Another area of contention arose when the Administration began requiring that faculty submit student evaluations of teaching and their faculty dossiers for annual performance reviews. Although the faculty objected based on the faculty handbook provision that student evaluations were to be sent *only* to the faculty member teaching the course, the Administration's view, inexplicably, was that the faculty handbook's statement in no way precluded deans, department chairs or the President from reviewing the student evaluations for purposes of annually reviewing faculty members.

B. Authority as to Academic-Related Matters

In making my determination herein, I have also considered the following evidence which reinforces the determination that the faculty in the unit petitioned-for herein are not managerial employees.

1. Enrollment

In Elmira College, *supra*, the administration adopted the recommendation of the faculty's ad hoc admissions committee as to the minimum student enrollment and as to the use of scholarships as a recruitment tool. Unlike Elmira College, the Administration here sets enrollment goals and enrollment levels without Faculty input. The Employer's Dean of Enrollment, Ron Sheincoff, a non-academic dean, handles undergraduate enrollment. The

Dean of the School of Adult and Professional Studies, Judith Bolsinger, handles the enrollment function for part-time, evening and graduate students and students enrolled in accelerated programs.

The Administration, specifically the VPAA and the Deans, also unilaterally determined Deans' limits for enrollment in particular classes without faculty approval. The determined class limit for all courses as decided by the Administration was 25 students with the reserve of 5 extra spaces to be filled at the discretion of the faculty member.⁴³ If enrollment in a given class is less than seven students, the Dean and the Department Chair are to determine whether to cancel the class.⁴⁴ When the Deans' limits were established, the VPAA directed the Registrar and an administrator for Student Services "that no one, not even the instructors themselves, may exceed these limits."

Elmira College, like Point Park, had a general minimum enrollment standard for a course to be taught of 10 students in undergraduate classes and 7 students in a graduate class. The origin of the minimum enrollment standard was unclear, but, unlike the situation in the instant case, the maximum class size was determined by each division's faculty. Several years before the hearing in Elmira College, the registrar had set class size limitations without consulting the faculty. The faculty complained and procedures were then put in place to ensure that the registrar's office did not unilaterally establish class sizes and the problem did not reoccur. In Duquesne University the faculty also had input into class size inasmuch as they voted to increase or decrease class size.

2. Schedules

It appears from the record that full-time faculty submit the courses they wish to teach and their preference as to teaching times to the deans of their respective schools. The dean

⁴³ The Administration established a lower limit for the English Composition course.

⁴⁴ Thus, the responsibility for effectuation of the Employer's policies in this area is entrusted to the discretion of the Deans and Department Chairs.

makes the final determination as to the courses to be offered and the times of the offerings. A schedule grid is prepared and the full-time faculty select courses to teach. To the extent needed, the grid will be completed with the names of adjunct faculty members. All department course schedules must then be approved by the VPAA each year.

In 1999, VPAA Stevens informed the full-time faculty that they were required to teach at least three days per week, and that he would not approve departmental course schedules for the 1999-2000 school year which included any two-day schedules for full-time faculty. This directive was not submitted to the Faculty Assembly or any of its committees.

At the hearing, Stevens explained that such a measure was necessary in order to meet the needs of the students and to distribute class times throughout the day and week. The implementation of this policy by the department chairs and program directors was almost complete as of the fall of 1999.⁴⁵ At the hearing, Stevens testified that he no longer approves a schedule which includes any two-day schedules for faculty.

Even after this directive, certain department chairs were scheduling classes at non-standard times in certain courses that spanned two of the established course time periods. On January 24, 2001, Stevens again notified all department chairs that they were not to schedule courses at times other than the established times.

In St. Thomas University, supra, where the Board determined that the faculty members were not managerial, the faculty, like the faculty here, was required to submit a proposed class schedule to the division chairperson who prepared the division schedule. In contrast, in finding

⁴⁵ Professor Darlene Marnich testified that then-department chair Dr. Revilla-Beltran advised faculty members that, due to PDE requirements, the faculty in the Education Department were no longer allowed to use blocked time or stacked courses. Blocked time refers to the approach of meeting once per week for two-and-a-half hours instead of meeting twice per week for one-and-one-quarter hours. Marnich testified that Education Department faculty preferred the use of blocked time as it emulated the larger block of time utilized in many schools and it was an easier time slot during which to have guest speakers or to participate in field trips. Thereafter, Marnich called the PDE and was informed that the PDE did not mandate the cessation of blocked time and stacked courses. Marnich reported this to Associate VPAA Liefeld. Liefeld told Marnich that she was not to call the PDE and that Marnich had “managed to anger” her department chair.

the faculty at American International College to be managerial employees, the Board noted that, at the department level, course offerings, course content, course descriptions and course scheduling were determined jointly by the faculty and the department chairmen, all of whom were included in the petitioned-for unit. The deans principally served only as coordinators between departments.

3. Tuition

The Administration sets the tuition and fee revenues as well as the level of funding for each of the four schools. The Employer's Vice President of Finance and Operations Paul Hennigan presents an operating budget, including tuition and fee revenues, to the Finance Committee of the Board of Trustees, which is then submitted to the full Board for a vote. Full-time faculty do not participate in this process and do not vote on budgetary issues.

Faculty members also use the audition forms, which are completed by the members of an audition committee when a prospective student is auditioning for acceptance into COPA, to recommend students in COPA for apprenticeship and scholarship monies. Dean Lindbloom reviews these recommendations. The department chair or the dean can reject the level of apprenticeship funds, but there is no evidence that the faculty recommendations have been rejected. The record establishes that apprenticeship funds range from \$500 to \$3000 per year, and are paid for work performed for the University. The record also establishes that the tuition charged to attend COPA is \$2000 to \$3000 per year higher than in the other schools. Lindbloom determines the amount of apprenticeship money to be allocated to each department in COPA. Students must apply for such funds to COPA's Director of Academic Administration. Scholarships are determined by the Employer's Financial Aid Office. As noted supra, it is impossible to ascertain whether full-time faculty constitute the majority of any audition committee. Thus, the record does not demonstrate that full-time faculty members effectively determine the scholarships granted to prospective COPA students.

4. Academic Calendar

The Curriculum Committee proposes an academic calendar, which is submitted to the Faculty Assembly. If approved, the Faculty Assembly forwards the academic calendar to the VPAA and the President for review of the calendar with the Executive Cabinet. When necessary, the Executive Cabinet proposes modifications to reconcile any conflicts due to religious holidays or other dates of particular interest to one constituency or another at the institution. Any modifications are then considered by the Curriculum Committee. The academic calendar is ultimately approved by the VPAA and the President. The record indicates that in January 2003, the Curriculum Committee proposed the academic calendar to the Faculty Assembly. On August 4, 2003, VPAA Stevens notified the faculty by letter that adjustments to the academic calendar were required to ensure that each regular semester included a minimum of 14 weeks, not including final exams. Apparently, this change was mandated by the PDE.

C. Authority Regarding Faculty Hiring, Sabbaticals, Tenure and Promotions, and Personnel Policies

The nonacademic factors discussed below are the least significant to my determination that the full-time faculty are not managerial employees. The Board has repeatedly placed less significance on the faculty's control or lack of control over nonacademic matters. St Thomas University, 298 NLRB 280, 284 (1990); Livingstone College, 286 NLRB 1308 (1987). See also University of Dubuque, 289 NLRB 349 (1988).

1. Faculty Hiring

The Faculty Handbook provides that the authority to appoint faculty is delegated to the President of the University by the Board. Moreover, appointments to the faculty are made with the recommendations of the appropriate faculty search committees and administrative principals. Normally, a search committee involved in the hiring of a tenure track faculty member must consist of three faculty members⁴⁶ from the appropriate discipline or department and one

⁴⁶ Whenever possible, the committee will consist of tenured faculty members.

additional faculty member, preferably in a related discipline, from another department.

Normally, the department chair or program director will chair a faculty search committee.

The record indicates that the current Administration does not consistently follow the agreed-upon procedures in the Handbook when hiring tenure track faculty members. For example, the appointment of associate professor of accounting Margaret Gilfillan in 2000 was accomplished without a search committee. This occurred after a search committee's recommendation to hire another accounting professor was rejected by the Administration. A similar hiring by the Administration and without a search committee occurred in the Business Department in 1998 with the hiring of Elaine Luther.

Although not an example of a faculty member being newly hired, the record contains one instance of a tenured faculty member being reassigned to the Business Department over the objection of the faculty in that department. When the Employer's library operations merged with the Carnegie Library in 1996, then-librarian Mary Jane Sunder was displaced as the librarian. Because Sunder was tenured, the VPAA at the time assigned her to the Business Department. The faculty of that department twice voted unanimously to reject Sunder, but she was assigned to the department anyway.

The Employer ignored the hiring procedure for full-time tenure track faculty when it directed the appointment of Director of the Honors Program Portia Weston. Likewise, it appears that when Revilla-Beltran went from an administrative position to a full-time tenure track position, her "hiring" did not follow the handbook procedures and was similarly a directed appointment. Furthermore, the appointment of Revilla-Beltran to department chair was also effectuated without the participation or input of the faculty in the Education Department or any other full-time faculty members.

As detailed in my Decision and Direction of Election the appointment of Paula Calabrese, Revilla-Beltran's successor as department chair of the Education Department,⁴⁷ is

⁴⁷ In January 2003 Revilla-Beltran announced that she was stepping down from the position of Education Department chair. Revilla-Beltran currently holds the position of the Employer's Academic Grant Manager, an administrative position.

another example of the Administration's failure to follow the Faculty Handbook procedures. The Administration refused to follow the procedures in the Faculty Handbook despite the fact that the faculty of the department specifically requested, by letter to Henderson, to Stevens and to the President of the Faculty Assembly that, in filling this position, those procedures be followed.

The record also contains evidence that the Administration recently decided to postpone filling a full-time faculty position. Thus, a faculty position was approved for a full-time faculty member to teach in the SAEM Program. VPAA Stevens and Dean Murphy decided to postpone the filling of that full-time position.

The Faculty Handbook does not mention non-tenure track faculty and contains no process for hiring full-time non-tenure track faculty. Notwithstanding this, after Henderson became President of the Employer, the Administration began to hire and continues the appointments of non-tenure track faculty despite objections by the faculty. Stevens' response to the faculty regarding this concern was dismissive and is further indicative of the Administration's narrow view of the faculty's role. Thus, Stevens told the Academic Personnel Policies Committee, a committee of the Faculty Assembly, that because certain types of appointments (tenure track appointments) were contained in the Faculty Handbook, this did not prohibit the use of other types of appointments (non-tenure track).

Stevens testified that the "process" used to hire full-time non-tenure track faculty is generally the same as for tenure track faculty, unless there is a need to abbreviate the process. Stevens admitted, however, that in many cases of hiring a non-tenure track faculty member there was not time or any particular reason to have search committees. Stevens said that where positions were available, department chairs recommended the hiring of the full-time non-tenure track faculty on one-year contracts directly to the VPAA. Since the hiring of the deans, the recommendations have been submitted to Stevens after review and recommendation by the dean. The VPAA then recommends the hiring to the President.

In fact, the record establishes that for the 13 non-tenure track appointments since 1998, none has involved a search committee convened by the department. The Employer further

acknowledges that the hiring of Rocio Martinez did not follow the process for hiring non-tenure track faculty. In that case, the Employer received a grant to hire a multi-disciplinary faculty member, and three department chairs recommended the hire of Martinez. Stevens also acknowledged some irregularity in the hiring of Mohammed Sidky and William Moushey.

With respect to Sidky, the record establishes that, in 2000, then-department chair George Bromall hired Sidky to teach full time in the MBA Program. At that time, the Employer was undergoing three review/accreditation processes. All three of the accrediting bodies informed the Employer that it was “woefully low” on full-time faculty, especially in the accelerated MBA Program. Stevens informed Bromall and the then-MBA Program Director Breslove that the department should move quickly. Inasmuch as Sidky had been an adjunct in the MBA program for two semesters, and the three felt that he would be a good faculty member, Sidky was hired. Stevens determined that Sidky would be hired on a non-tenure track basis.

Moushey was hired in 2001 as a non-tenure track faculty member in the Journalism and Mass Communications Department. Moushey was hired after discussions between Department Chair Helen Fallon, VPAA Stevens and President Henderson.

Finally, the Administration further diminished the faculty’s authority as to faculty hiring in the fall 2003, when Vice President of Finance Hennigan issued a policy allowing non-faculty staff members to teach a maximum of one course per semester with the permission of their supervisor.

In American International College, supra, all of the instances of faculty hiring in the record were as a result of recommendations made by the faculty and/or the department chairmen. Likewise, in Duquesne University, supra, the faculty screened, interviewed and recommended full-time faculty members for hire, and the dean had no authority to hire a candidate against faculty recommendation. The record herein does not establish that the faculty effectively recommend faculty hiring. Rather, the faculty participate on search committees only when the Administration chooses to convene such committees for the purpose of hiring new faculty members. Then, the department chair, dean, and VPAA, all make

independent recommendations. In addition, the Administration does not consistently follow the hiring procedures set forth in the Faculty Handbook for the hiring of tenure track faculty members. The non-tenure track faculty hirings also failed to comport with the process to be followed by the Employer as testified to by Stevens.

With respect to the appointment of department chairs, the record again indicates that faculty recommendations have been ignored on occasion by the Administration. Finally, in selecting deans, it appears that faculty input was not considered in four of the six instances described in the record.

There is no procedure in the Faculty Handbook for hiring school deans inasmuch as the handbook was approved in 2000, and the creation of the four schools did not occur until 2002. However, in hiring the deans, the Employer utilized the process⁴⁸ it claimed to use for the hiring of a VPAA which was “adapted from” the process set forth in the Handbook. There have been six dean hirings since the conversion to university structure.⁴⁹

Stevens testified that the hirings of Bruce Murphy and Ronald Lindbloom followed the Employer’s process as described above. However, with respect to the search for Dean Murphy, Henderson decided that Dr. Jeffery Zoffer, an outside consultant, would chair the search committee, contrary to the normal protocol. In addition, there were at least eight voting members of this search committee, only three of whom were non-department chair full-time faculty members. Thus, the faculty members were in the minority in the decision to hire Murphy. In the end, two unranked candidates were presented and Henderson chose Murphy.⁵⁰

⁴⁸ The process is set forth in my Decision and Direction of Election.

⁴⁹ The six dean hirings have been the hiring of Bruce Murphy for the School of Business, Robert Fessler as Interim Dean for the School of Arts and Sciences, Steven Fritz as second Interim Dean of Arts and Sciences, Ronald Lindbloom as Dean of COPA, Judith Bolsinger as Interim Dean of the School of APS and Judith Bolsinger as Dean of the School of APS.

⁵⁰ President Henderson’s directive that “unranked” candidates be presented to her does not comport with the Faculty Handbook. The Handbook procedure for hiring tenure track full-time faculty provides that normally one candidate is recommended. If candidates are equally qualified more than one name can be submitted by the search committee.

In the case of Interim Dean of Arts and Sciences Fessler, the record establishes that Fessler was appointed to the position in the summer 2002 by Henderson, based on the recommendation of Stevens. Stevens explained that he conferred with the department chairs because there was insufficient time to conduct a search. Stevens was interested in having Fessler as the Dean of Arts and Sciences for one year to work with the department chairs and faculty in redesigning the core curriculum. Therefore, Fessler was appointed with the understanding that he would step down after one year, at which time Fessler would assume the directorship of the core curriculum.⁵¹ No Search committee was formed for this appointment.

A search for a permanent dean of the School of Arts and Sciences began in the fall of 2002. At that time, a search committee was formed.⁵² After the search procedures were completed, the committee recommended three candidates. The record reflects that Henderson offered the position to one of the candidates, who declined the position. Henderson felt the other two were unworthy, and thus she aborted the search. At that point there was insufficient time to begin a new search to have a permanent dean in place by the summer of 2003.

As a result of these time constraints, the Administration brought to campus four candidates recommended to Henderson by the Registry for Interim Presidents, a corporation that works with former college presidents and institutions in need of interim administrators. Fritz was hired using this process in about January 2003, after the department chairs who were on the search committee⁵³ submitted written evaluations to the VPAA and to the President.

As to the selection and appointment of Dean Judith Bolsinger, the record indicates that, in the summer of 2002, Henderson appointed Bolsinger to the position of Interim Dean of the School of Adult and Professional Studies. Stevens characterized this as a “change in title”, as

⁵¹ The record contains no other information on the position of the directorship of the core curriculum.

⁵² The record does not reflect the members of the search committee except that Department Chair Mark Farrell was one of the members.

⁵³ The record is unclear as to whether any non-chair full-time faculty members were on the search committee. However, the record establishes that only the department chairs submitted written evaluations to the VPAA.

Bolsinger's previous position had been the Dean of Part-Time and Accelerated Programs. On Stevens' recommendation, Henderson appointed Bolsinger to be the permanent dean of the School of APS. No Search committee was convened for either the interim or permanent dean position. Despite Stevens' characterization, the record establishes that the School of APS now offers two academic programs, whereas Bolsinger had no responsibility for academic programs in her previous position.

2. Sabbaticals

The Faculty Handbook provides that sabbatical leaves to full-time faculty members are "granted by the President on the advice and recommendation of the Dean of the Faculty and the APPC." Sabbatical leaves typically are taken every seven years, either for a semester or for a full year.⁵⁴

Full-time faculty members make application for sabbatical leaves to the APPC after the department chair approves the sabbatical proposal submitted by the faculty member. The APPC makes a recommendation to the VPAA. The VPAA then forwards the recommendation, together with his own recommendation, to the President. The Administration considers budgetary constraints in connection with its decision to reject or defer a sabbatical.

The record establishes that between 1998 and 2003, the Employer granted 13 sabbatical leaves, all of which were recommended by the APPC. For the 2001-2002 academic year, the APPC approved three sabbatical requests. Stevens initially decided to delay the sabbaticals based on financial reasons, which were not fully explained to the APPC. The APPC notified Stevens of its objection to his decision by memo dated December 12, 2000. It appears from the record that Stevens reversed himself and the sabbaticals took place at the requested times.

Although the APPC's recommendations as to sabbaticals have ultimately been followed, the APPC must make recommendations subject to the guidelines of the college, which permit

⁵⁴ The faculty member receives one-half pay for a full-year sabbatical or full pay for a one-semester sabbatical.

about ten percent of the faculty to take sabbaticals in any academic year. In addition, the number of sabbatical leaves actually granted depends upon budgetary considerations and department needs, as determined by the VPAA.

3. Tenure and Promotions

The Employer asserts that from 1998 to 2003, all 14 full-time faculty recommendations for tenure were accepted by President Henderson. However, the record contains several deviations from the tenure requirements and process described in Section 39 of the Faculty Handbook.⁵⁵

As detailed in the Decision and Direction of Election, the record establishes that in 1999 the Administration gave professor status to and appointed Revilla-Beltran to the position of department chair in the Education and Community Services Department.⁵⁶ Two years later, in 2001, Revilla-Beltran was awarded tenure at the recommendation of VPAA Stevens. No departmental committee was formed to review Revilla-Beltran's tenure request.

The Administration also directed the tenure of Raymond Laine, in December 1999, shortly before Laine's death. Laine was a full-time faculty member in the Theatre Department. Laine did not have a bachelor's degree, but obtained his position based on his acting experience. In any event, when Laine was hospitalized with an incurable disease, Stevens recommended to Henderson that tenure be directed. Henderson approved this recommendation.

Finally, the record establishes that Portia Weston was hired in 2003 as a faculty member with the highest rank of professor and with a four-year credit toward tenure. In addition, Weston's offer of employment included a commitment that her tenure review will be conducted

⁵⁵ That process provides for the formation of a departmental committee composed of all tenured full-time faculty for the evaluation of faculty who are eligible for tenure and promotion. If there is an insufficient number of full-time faculty to form a committee of at least three members, the VPAA will appoint additional tenured full-time faculty with expertise in the academic discipline to the review committee.

⁵⁶ Before 1999, Revilla-Beltran was not a full-time faculty member; rather, she held the administrative position of the Director of the Program for Academic Success.

by the VPAA in October 2006.⁵⁷ Weston's hiring under these circumstances circumvents the requirement that tenure be attained after a six-year probationary period. In addition, it appears that her review will be conducted without the recommendation of a tenure committee.

Of the 17 cases involving the tenure provisions of the Faculty Handbook, the Administration circumvented those provisions in three, or approximately 17 percent, of the cases by directing tenure and/or providing credit toward tenure.

Unlike here, the faculty in American International College was the *only* body that was responsible for evaluating the academic qualifications of candidates eligible for tenure. There, the faculty and administration realized that if tenure continued to be almost automatically awarded to eligible faculty members there would be terminations of tenured faculty because of budgetary limitations. The faculty committee then substantially modified the tenure system and the faculty's decision in this regard was accepted by the administration.

With respect to the non-academic matters of hiring and tenure, the record in Elmira College established that in the four years prior to the hearing, the faculty search committee recommendations were accepted in all 27 cases where a full-time faculty member was hired. In addition, the college's president accepted the committee's recommendation on 45 out of 46 tenure reviews over a 4-year period. In LeMoyne-Owen II, a faculty-dominated committee developed formal procedures governing tenure determinations, and revised and implemented the section of the faculty handbook governing the evaluation of faculty.

The composition of the committee to consider promotions is nearly the same as the departmental committee called to review tenure.⁵⁸ Again, separate recommendations come from the committee, the department chair, the dean, for those promotions occurring after the year 2002, and the VPAA. The President makes the final determination on all promotions.

⁵⁷ Stevens acknowledged that Weston's hiring did not comport with the Faculty Handbook. Stevens characterized this hiring as a "directed appointment".

⁵⁸ The promotion committee is comprised of a minimum of three tenured faculty and one tenured faculty member from another department.

From 1998 until 2003, 21 out of 25 individuals recommended by departmental promotion committees have been promoted.

The record reflects that on two occasions when the Administration did not agree with the recommendation of the promotion committees to grant promotions, Henderson deferred the promotions for a period of one year, after which both faculty members reapplied for promotion. In another case, the President rejected the recommendations of the department committee, chair and dean to promote the faculty member. Instead, on the recommendation of Stevens, Henderson deferred the promotion for at least one year. In this case the faculty member did not reapply for promotion. In the fourth case, the VPAA rejected the recommendation of the Promotion Committee, the department chair and the Interim Dean of the School of Arts and Sciences to promote an Associate Professor to Professor. Henderson agreed with Stevens, and the promotion was not granted. A fifth instance occurred when there was no faculty input when Henderson promoted Revilla-Beltran to the highest academic rank of Professor.⁵⁹

Thus, in five out of 26, or approximately 20 percent of the cases, the Administration either did not follow the recommendations of the promotions committee or unilaterally directed a promotion.

4. Personnel Policies

The record reflects that the Administration acts independently of the faculty when implementing personnel policies and certain areas of academic policy, notwithstanding the fact that the Academic Personnel Policies Committee ("APPC") of the Faculty Assembly is charged in the Faculty Assembly Bylaws with making recommendations of personnel policy to the Faculty Assembly and to the Employer's President for transmission to the Board of Trustees.

During the spring of 2002, VPAA Stevens, in consultation with President Henderson, decided that a comprehensive policy manual for the entire university was warranted. Henderson and Stevens engaged an outside consultant to provide drafts of policies that cover the whole

⁵⁹ The promotion of Revilla-Beltran is not one of the 21 promotions in which a promotion committee with faculty membership was involved.

range of issues in higher education even though the then-current Faculty Handbook contained a faculty handbook revision process.⁶⁰ The result was six draft volumes, two to three of which relate to faculty. One such volume, entitled Faculty Personnel Policies, will replace the Faculty Handbook.⁶¹ The drafts of all six volumes are largely the work of the consultant.

Replacing the Faculty Handbook also affects each faculty member's annual contract with the Employer.⁶² Notwithstanding this provision, neither the APPC nor the Faculty Assembly were involved in the drafting of the proposed replacement of the Faculty Handbook. They did not participate in the drafting of proposed academic policies and they had no role in deciding to engage the outside consultant.⁶³

Not only was the faculty excluded from the decision to redraft/replace the Faculty Handbook, but the Administration has set a deadline after which it can adopt the new policy manuals, if the faculty fails to timely request revisions. VPAA Stevens provided drafts of the policy manuals to the APPC in early September 2003. Stevens further informed the Faculty Assembly, by memo, that the manuals will be approved, after revisions, by the Board of Trustees in April 2004.⁶⁴ Unlike the exclusively Administration-driven revision of the Faculty

⁶⁰ The Faculty Handbook Revision Process at Section 6.4 of the Faculty Handbook provides that recommendations for revision are to be submitted to the VPAA, Faculty Assembly, and appropriate committees thereof for review.

⁶¹ It appears that those policies relating to faculty are contained in Volume I - Governance and Administrative Organization; Volume 3 - All College Employment Policies; and Volume 4 – Faculty Personnel Policies.

⁶² Section 6.3 of the Faculty Handbook provides that the handbook is, by reference, included as part of the annual contract between faculty members and the Employer.

⁶³ The Employer has asserted that the APPC agreed with the VPAA's recommendation that changes to the handbook be proposed and discussed, and that a consultant, Dr. Tom Emmett, was retained by Point Park in 2003 to assist with this project. The record does not support the notion that the APPC envisioned having the Employer, on its own, draft revised policy manuals to which the faculty could react. Rather, the record contains minutes of the October 7, 2002 Faculty Assembly meeting, during which Stevens reported that he and the APPC agreed that significant modifications to the Faculty Handbook would be needed as the college restructured itself, and that Stevens "offered to submit some basic proposals to the APPC 'to begin working on them as a starting point'."

⁶⁴ The record also contains the July 23, 2003, minutes of the Board of Trustees meeting. These minutes reflect President Henderson's explanation of Resolution 14/2003 regarding "decision-making authority". The minutes establish that the Employer expected a lot of discussion, especially among the faculty, and

Handbook in this case, in LeMoyne-Owen II a faculty committee had recently undertaken a review of the faculty handbook at the time of the hearing, and any recommended revisions thereto were subject to ratification by the faculty.

As to specific policy matters, the record establishes that the APPC has attempted unsuccessfully to have input on both academic and nonacademic issues, including salary administration, shared governance in the decision to seek university status, faculty appointment types, school deans and overload policies. The Employer's response to these attempts is set forth in a memo from VPAA Stevens to the APPC dated February 15, 2002.

With respect to salary administration, Stevens summarily stated that the Faculty Handbook does not contain any policies or procedures for faculty salary administration. The Employer has implemented many policies affecting faculty salary without submitting those policies to a vote of the Faculty Assembly. For example, the Employer implemented a Salary Parity Plan in 2000. Likewise, the Administration made decisions with respect to stipends paid to department chairs, program directors and non-program directors,⁶⁵ about which the Faculty Assembly had no input.

The record establishes that the Administration has favored a merit pay system for faculty since 2001. The faculty voted on and rejected merit pay twice and let it be known that its position was to have across-the-board wage increases. Henderson felt the faculty's opposition was unreasonable. Ultimately, on the recommendation of President Henderson and VPAA Stevens, the Board of Trustees approved the implementation of the merit pay policy. The implementation has not ended faculty complaints on this issue. At the February 3, 2003, meeting of the Faculty Assembly, the subject of merit pay was raised in VPAA Stevens' address to the faculty. Stevens deferred to Henderson when a faculty member asserted that the

the possibility that the redraft might never be passed despite a spirit of compromise. The resolution proposed by Henderson would not allow discussion to go on endlessly, but would bring the manuals to the Board at the April 2004 meeting. This motion was carried unanimously.

⁶⁵ A stipend is a salary supplement paid to those who also perform administrative duties.

Administration's actions in seeking university status and implementing merit pay belied Dr. Henderson's previous statement that the Employer engaged in participatory management. Henderson responded that participatory management meant that she had to listen to what the faculty said, but that she did not have to do what they said. When the faculty member opined that this was not democratic, Henderson emphatically responded that, "This is not a democracy."

In 2002, the Administration also unilaterally devised a 200 point rating system whereby Stevens designated ten areas⁶⁶ in each of which a faculty member could be rated on a scale of 1 to 10. Stevens determined that faculty members with ratings of 190 and above would receive a merit increase.

The faculty's lack of input and authority in this case sharply contrasts with the authority of the faculty in American International College. There the faculty objected to the existing across-the-board salary increases, and the faculty established its own merit evaluation system, which had an effect on decisions regarding retention, salary increases, promotions and tenure.

Like the Employer's response to the APPC regarding the request to have input on salary administration issues, Stevens informed the APPC that a decision like the decision to apply for university status was uniquely within the responsibility of the Board of Trustees. Stevens also interpreted the Faculty Handbook as meaning that only those areas that are "specifically academic" are the areas where shared governance exists. Thus, the Administration's interpretation in this regard excluded the faculty from any input into the many academic consequences of the decision to seek university status, such as the restructuring of the academic organization of the institution.

⁶⁶ The areas included college service, advising, professional development and scholarship.

III. NEWLY ADMITTED EVIDENCE

Employer Exhibits 71(a) through 71(j), which are minutes, agendas and a summary of the Faculty Assembly for certain meetings between February 7, 2000, and October 6, 2003, and Employer Exhibit 72, the Middle States Report, were offered by the Employer and received into the record after the remand of this case. The Employer argues at pages 28 to 31 of its Brief that the newly-admitted Faculty Assembly minutes and the Middle States Report constitute further evidence that the faculty has substantial authority over academic areas, including curriculum and, thus, the faculty should be found to be managerial.

The Employer's arguments in this regard fail for several reasons. First, the minutes of the Faculty Assembly do not by themselves establish that the Employer did, or did not, implement any actions. During the months when the 20-day hearing was being conducted the Employer failed to pursue its request for the subpoenaed Faculty Assembly minutes. Nevertheless, the D.C. Circuit Court disagreed with the Board's refusal to reopen the hearing to supplement the record in light of the timely sought but late-produced subpoenaed materials. Thus, the record was reopened and the exhibits offered by the Employer were received as stated in my Order dated March 16, 2007. The Employer did not seek to introduce any other evidence about the subjects discussed in the Faculty Assembly minutes.

In addition, much of the information the Employer sets forth as having been contained in the Faculty Assembly minutes is simply not included in those documents. For instance, the Employer cites, *inter alia*, revisions to Math requirements in Electrical Engineering, adding a fourth concentration to the Business major, several specific changes regarding education courses and specific revisions to courses in the Electrical Engineering Technology program, establishing a joint degree program in Journalism and Film, and approval of a new graduate program, M.A. Curriculum and Instruction, and other program changes, revisions to program requirements, restructuring of majors, creating new courses and elimination of courses.

As to certain of the other information that the Employer claims is contained in Employer Exhibit 71 (a) through 71 (j), the minutes reflect only that specific topics were discussed and resolutions passed. The Employer's Brief, however, includes detailed information which is not part of the minutes and, therefore, not part of the record. One example of this type of overstatement of the information in the minutes relates to the Faculty Assembly minutes for March 12, 2001. The Employer asserts at page 29 of its Brief that the Faculty Assembly minutes show that the faculty approved the awarding of "Transfer Credit for Study Abroad options", and that the faculty approved "two changes to the Honors Program, including course development procedures for new course offerings and an addition to the program goals and objections to promote innovative teaching methods that encourage student participation, i.e., the methodology of teaching." The minutes for the March 12, 2001 meeting of the Faculty Assembly⁶⁷ state only that Dr. Farrell submitted a proposal regarding the Honors Program and on its Study Abroad Program. The minutes also indicate that Dr. Alexander summarized "some of the details of the overall proposal, including specifics on earning credits at Regents College in London." The "friendly amendment" to separate the two individual items was accepted and ultimately the motion regarding the Study Abroad Program was passed by a show-of-hands vote. The second item regarding the Honors Program was passed by acclamation. No further substantive information on these proposals is contained in the minutes.

The Employer also provides purported statistics in its Brief regarding the number of Faculty Assembly resolutions and Curriculum Committee recommendations contained in the minutes as compared to the total number of resolutions and recommendations approved by the Faculty Assembly between 2000 and the close of the representation case hearing. This information is not set forth in any evidence contained in the record in this matter. At footnote 24 of its Brief, the Employer cites the verification of Cynthia Liefeld, which was attached to the Employer's Response to the Motion to Show Cause in Case 6-CA-34243.

⁶⁷ At the top of the third page of the March 12, 2001 Faculty Assembly Meeting Minutes the date is incorrectly recorded as "2/5."

The verification of Liefeld is not part of the record in this representation proceeding nor was it a document the D.C. Circuit Court determined the record should be reopened to receive. At no time during the protracted course of these proceedings did the Employer seek to offer the verification into evidence. Assuming the reference to the verification in the Employer's post-remand Brief could be construed to be such an offer, I reject it. The Employer did not call its administrator, Assistant VPAA Liefeld, to testify during the 20-day representation hearing in this matter. The Employer never alleged that Liefeld was unavailable to testify at the hearing and did not seek to have the record reopened for any further testimony.

As to the submission of additional evidence after the remand, the Board provided the Employer with the opportunity to set forth the evidence it contended should be received in this matter. The Employer made its request, which was limited to selected Faculty Assembly minutes and the Middle States Report.⁶⁸ The record was, as noted above, reopened for the receipt of these exhibits, and again closed. Clearly, the Employer is now attempting to rely on material which is not part of the record. The Employer never indicated that it desired to offer more evidence than that which was received in the Order Reopening the Record and Receiving Exhibits, Order Closing Record and Briefing Schedule, or that what was received was in any way insufficient.⁶⁹ Having foregone the opportunity to make such a request, the Employer cannot now be permitted to rely on inadmissible hearsay, which was not subject to cross-examination, from a witness not shown to be unavailable, to support its burden of proving managerial status. Marine Engineers District 1 (Dutra Construction Co.), 312 NLRB 55 (1993). See also NLRB v. McClure Associates, Inc., 556 F. 2d 725 (4th Cir. 1977); Teamsters, Local 812 (Sound Distributing), 307 NLRB 1267, 1269, fn. 3 (1992); ACS, LLC, 345 NLRB No. 87 (2005), slip op. at 5.

⁶⁸ Other than to enter the requested exhibits, the parties were satisfied with the state of the record.

⁶⁹ As specifically noted in the Order Reopening the Record and Receiving Exhibits, Order Closing Record and Briefing Schedule, following the Board's remand of this matter to me and its granting of the Employer's Motion to Reopen and Supplement the Record, I received into evidence the entirety of the employer's post-hearing proffer of additional evidence.

Because the documents included in Employer Exhibit 71 do not establish what, if any, action was taken by the Administration in response to the faculty's views, and because the documents do not contain the information on which the Employer apparently relies in asserting that these documents establish managerial status, I do not find them to constitute probative evidence that the faculty has managerial authority.

As to Exhibit 72, the Employer argues that the Middle States Report prepared by an evaluation team following a visit to the campus on October 29 to November 1, 2000, as well as the Employer's self-study document submitted in 2000 in preparation for the accreditation review, establish faculty control over the curriculum and that the faculty have an effective voice in the accreditation process. The Petitioner disputes the relevance of the Middle States Report, arguing that the conclusions reached therein were based on the results of a site visit in 2000, three years before the petition in this matter was filed. Moreover, the Petitioner argues that the evaluation reflected in the Middle States Report was rendered obsolete by the actions of the administration in choosing to relegate the faculty to a strictly consultative role in the years after the 2000 visit.

The portion of the Middle States Report apparently relied on by the Employer for its assertion that the Report speaks to the issue of faculty input and control over academic and non-academic matters is a paragraph of the portion of the Middle States Report entitled, "Institutional Integrity" at page 4, which states:

Based on interviews with board members, the president, administrators, faculty, staff and students, and a thorough review of the documentary evidence provided by the College, the team found evidence that the faculty have substantial input and control over curriculum and input into academic policy-making. The recent addition of an Academic Policy Committee of the Board of Trustees that will include faculty representation, is further evidence of the serious and purposeful attention paid to the educational mission of Point Park College.

A review of the entire Middle States Report⁷⁰ reflects that the evaluation team had differing impressions of the faculty's input and authority. In this regard, the evaluation team cited "noticeable tension and misunderstandings about the perceived dissonance of admission standards and programmatic quality for the traditional and non-traditional students. While we have seen evidence that the college made a compelling case for differentiation based on market segmentation and the unique needs of non-traditional students, there still remains a vocal minority who oppose what are perceived as inequities in the two programs."

The evaluation team's comments further reflect that the Administration takes significant actions without including the full-time faculty. For example, the evaluation team noted the strong working relationship between the Employer's Board of Trustees and President Henderson and the senior management team of the institution. The team also noted that it was the Board of Trustees that was likely the key constituency in assisting President Henderson. The Middle States Report reflects that the College Plan of 1998, the first five-year strategic plan, made an outstanding effort to identify operational objectives assigned to each senior administrator. As the team acknowledged, the College issued a second edition in the spring of 2000 and thereafter completed a third revision, which had not been widely distributed to the college community at the time of the issuance of the Middle States Report. One of the weaknesses cited by the evaluation team was that the revisions to the strategic plan were undertaken by the senior administration without a strong effort to seek input from the original planning committee or the campus community as a whole.

⁷⁰ Initially, I note that a reading of the Middle States Report raises the question as to whether this document is the "final report" of the evaluation team. The concluding paragraph of the introduction section at page 3 of the report states, "The team has organized its observations in each of the self-study chapters, then noted, where appropriate, strengths and weaknesses. For purposes of clarity, we have added both suggestions and recommendations. The former we send along for the college's internal consideration. The recommendations will be added to the final report." In any event, Employer Exhibit 72 is the document the Employer chose to offer into evidence, and it is the document I have examined in making my determinations herein.

Among the weaknesses perceived by the team as to the organization, administration and governance of the College was that “communication to administrative units, department chairs and faculty of College plans and direction appears to be sporadic in some areas” and that “training on College policies and procedures for access to essential resources are not perceived as available to administration, faculty and staff.” Thus, the team recommended that the Employer both clearly define Board bylaws to determine the nature and scope of faculty participation, and consider monitoring the communications between strategic leaders and department chairs to promote consistent communication between administrators and faculty.

On finance, the team noted the College’s financial dependency on tuition, and that the College’s announced intention to increase faculty salaries for the next several years by eight percent annually might not be financially feasible.

On educational programs and curricula, the team noted that revisions to majors must be submitted for further consideration to the curriculum committee of the faculty assembly and simultaneously to the Vice President of Academic Affairs. In addition, one of the weaknesses discussed with respect to the undergraduate bachelors degree general education core, was that there was no cross-departmental faculty committee or coordinating unit to attend to scheduling, curricular revisions, continued outcomes and program assessment, uniformity of quality and other overall issues related to the core offering, particularly to the follow-up of recommendations arising from the Self-Study survey’s analysis. The team also cited as a weakness the fact that some departments felt that the core courses might not provide enough flexibility for some of the students.

Because of deficiencies as to the content of some of the business programs, the team recommended that the Employer offer a single undergraduate business program and one MBA program with different options or concentrations, as such a program may present a better image of one quality program to the outside community.⁷¹ One of the team’s overall recommendations for

⁷¹ As noted in my Decision and Direction of Election, in 2001 the International MBA was combined with and made a concentration in the MBA program without faculty input.

the undergraduate programs, except COPA, was that all academic programs develop and implement program outcomes assessment instruments, such as advisory boards, for program revision.

The team concluded that the Employer recognizes that the faculty are the educational foundation of the institution and most important employees of the institution, but concluded that the limited number of full-time faculty had created heavy reliance on an adjunct faculty and an over emphasis on overloads for full-time faculty. In COPA, the team recognized that although program directors were given “some” autonomy in such areas as curriculum revision, decision-making on this, on budgets, on play selection, and the like remained in the Office of the Chair.

As to part-time, accelerated and graduate admissions, the evaluation team cited confusion regarding the development of new degree programs as a factor which might hinder recruitment potential. In the section of the Middle States Report, entitled “Institutional Change and Renewal,” the team noted that there is a perceived lack of a program review process, and that program expansion should not be driven exclusively by enrollment demand.

Based on a review of the entire Middle States Report, I cannot conclude that this newly admitted document constitutes probative evidence that the faculty are managerial or that they have substantial authority over academic areas, including curriculum. Rather, it appears that the Board of Trustees and senior management team are the key constituents to the President in operating the Employer’s institution. Indeed, communication to department chairs and faculty as to the Administration’s plans was described as sporadic in some areas. In addition, as to part-time, accelerated and graduate programs, expansion was driven by enrollment rather than by the deliberations of the faculty. The portion of the Middle States Report cited by the Employer does not meet the standard for analysis expected by the D.C. Circuit Court or the Board in that the evaluation team failed to explain the basis of the conclusory statement relied upon by the Employer to meet its burden of proof. This is especially true when the report is viewed in its entirety. Accordingly, I do not find that Employer Exhibits 71(a) through 71(j) and Employer Exhibit 72

establish or tend to show that the faculty has substantial authority over academic areas, including curriculum, or that the faculty play a substantial role in the operation of the enterprise.

IV. SUMMARY

Faculty members are not presumed to be managerial employees. Rather, the Board has repeatedly emphasized that the party seeking to exclude faculty as managerial has the burden of coming forward with evidence necessary to establish such an exclusion. See, e.g., Montefiore Hospital and Medical Center, 261 NLRB 569, 572, fn. 17 (1982); University of Great Falls, 325 NLRB 83, 93 (1997); Union Square Theatre Management, 326 NLRB 70, 71 (1998).

As the D. C. Circuit Court observed, in the absence of an express statutory exclusion for management employees, the Supreme Court in Yeshiva implied an exclusion for employees who may be “regarded as so clearly outside the Act . . . that no specific exclusionary provision was thought necessary.” Point Park, 457 F.3d at 47.

The key to determining the managerial status of college faculty under Yeshiva is “whether the faculty in question so controls the academic affairs of the school that their interests are aligned with those of the university or whether they occupy a role more like that of a professional employee in the ‘pyramidal hierarchies of private industries.’ ” Point Park 457 F.3d at 48, quoting Yeshiva, 444 U.S. at 680. The record herein establishes the faculty’s lack of control over the academic affairs of the university and the divergence of the interests of the faculty and the Administration.

The record herein confirms the faculty’s lack of input as to the structure of the institution, including both the change from department-based to school-based governance and the decision to seek university status. Unlike Yeshiva, the Employer is not dependent, and does not rely, upon the faculty as the de facto administration. The Employer here has a well-defined administrative hierarchy, including the deans and the newest administrative body of the Dean’s Council. The Employer’s Administration decides on such issues as programs, courses, tuition,

enrollment, admissions criteria, grading systems, grades and various academic programs and policies, including policies relating to independent study, study abroad and syllabi requirements. Moreover, it is undisputed that while the faculty can communicate its views and make recommendations which, as noted in the Faculty Handbook, are “respected,” the Board of Trustees has final authority in all matters.

I have considered authority over academic matters to be the most critical to the determination of managerial status. Yeshiva and its progeny establish that authority over academic matters is the most important indicator of managerial status. In addition, the business of a university is education and the creation and delivery of the product must be the primary focus in determining the status of the faculty.

With respect to the new programs about which there is evidence in the record, the Administration abandoned three out of fourteen undergraduate programs approved by the Curriculum Committee and the Faculty Assembly. Abandoning the program obviously includes abandoning the courses which made up that program, all of which courses should have been previously reviewed and recommended by the Curriculum Committee and the Faculty Assembly in accordance with the process by which an undergraduate program becomes a part of the curriculum. In addition, the Administration offered SAEM as an undergraduate program, even though it was only approved by the faculty as a graduate program and did not go through the required process to become an undergraduate program. Thus, the treatment of 29 percent of the undergraduate programs and 17 percent of the graduate programs discussed in the record was not decided upon by the faculty, unlike the situation in American International College, where all new undergraduate and graduate degree programs were proposed by the faculty and the proposals were uniformly implemented by the Administration.

The Administration also dismantled the GIS Department, which affected the course offerings in two other departments. The Administration restructured the MBA program, one of the consequences of which was that only four of the 26 courses from the International MBA program remained in the MBA program. The Administration created the Innocence Institute,

which affected the offerings in the department it was made part of, and the Administration contracted with Berlitz/ELS Education Services which resulted in the effective, if not formal, discontinuance of the Employer's then-existing ESL program and the courses offered as a part of that program. The Administration also changed the requirements for two programs in the Education Department without faculty input. Finally, a special topics course designed by the Administration was prematurely designated as a course required of all freshmen and thus was handled contrary to the established process for new courses. As to the Honors Program, the Administration did not advise the faculty as to its view of curricular recommendations made by the National Collegiate Honors Council.

In the area of program discontinuance there is some indication that the administration acceded to the will of the faculty by formally discontinuing the 13 programs approved by the Curriculum Committee instead of all 43 programs proposed by the Administration. However, even here, the Administration cited under-enrollment as the reason for its recommendation, which was not an educational consideration upon which the decision to discontinue the program was supposed to be based. In addition, the record contains instances where the Administration effectively, although not formally, discontinued programs without faculty input, such as when the Administration offered an alternative to the ESL program and when it reduced the International MBA program to a track within the MBA program.

The faculty here is not accorded responsibility for the delivery of the Employer's curricula, despite the fact that the faculty, through the academic departments, is supposed to have this responsibility, according to the Faculty Handbook. Thus, without the approval of the Curriculum Committee or the Faculty Assembly, the Dean's Council developed policies with respect to on-line courses, special delivery courses, independent study and faculty-led trips abroad, all of which impact on the manner in which the curricula is delivered.

There is likewise evidence that the faculty have been unaware of changes to their courses. Specifically, the requirements for special delivery courses were changed by the Administration to include an additional 14 hours of activities outside the classroom, which

activities were determined by the Administration. The requirements for independent study approval were changed such that faculty members could no longer independently approve these courses. The Administration also suspended faculty-led trips abroad and adopted a new process for faculty to complete before such trips would be approved.

As to admissions, the origin of the undergraduate admissions standards is unknown. With respect to accelerated program admissions, the record shows that the Administration has, without faculty input, changed the admissions standard for presumptive admissions in the accelerated Criminal Justice program and in the MBA program.

As to grading, the Administration directed each of the four schools to individually determine whether to accept the plus/minus grading system that the faculty as a whole twice rejected. When only one of the schools accepted this grading system, the Administration determined that the use of the grading system would be a pilot program. As detailed herein, the Administration has changed the grades given by faculty on more than an isolated or infrequent basis, including in one instance the use of the plus system which the faculty had rejected. The Administration imposed syllabi requirements containing mandatory policies that also impact the faculty's grading of students. These Administration-mandated syllabi requirements even affected the faculty's teaching methods by requiring certain library and research work. Finally, the Administration has decreased the bonuses to faculty members who, in the Administration's judgment, issue too many A's.

The Administration ignored the Faculty Handbook Revision Process when it engaged an outside consultant to redraft the employer's policies, including the Faculty Handbook. Not only did it ignore the established process, but at the time of the hearing in this matter the Administration had set a deadline for adoption of the new policy manuals if the faculty failed to timely request revisions. Thus, as noted in my original Decision and Direction of Election in this matter, in this case the record evidence establishes that the Administration has arrogated to itself the unilateral right to change the fundamental document governing the relationship between the faculty and the Administration. No such assertion of the unilateral right to alter the

document most fundamental to establishing the status of the faculty vis-à-vis the Administration is found in Yeshiva or other cases, including LeMoyne-Owen II, where it was concluded that university faculty constitute managerial employees excluded from the protections of the Act.

Balancing the one area of program discontinuance where there is some question of faculty control, against the demonstrated lack of control over programs, courses, academic policies, grading, enrollment, schedules, tuition and the structure of the university detailed herein, the record establishes that, unlike Yeshiva, the faculty in this case do not “substantially and pervasively operat[e] the enterprise.” Yeshiva, supra at 691.

Clearly, a showing of control over nonacademic matters, in circumstances like those present here where faculty do not have control over academic matters, would be insufficient to meet the burden of proving managerial status. Nevertheless, the cases discuss control over nonacademic matters. Thus, those matters are discussed herein. In this case, just as with academic matters, the faculty herein do not effectively recommend or control nonacademic matters.

With respect to faculty hiring, the Administration does not follow the Faculty Handbook when hiring tenure track faculty members, inasmuch as the Administration hired two faculty members without a search committee, assigned the former librarian to the Business Department even though the department rejected the reassignment on two occasions and directed the appointment of two other tenure track faculty members.

Although the Faculty Handbook contains no provision for the hiring of non-tenure track faculty and deans, the Administration hires non-tenure track faculty and deans using processes it adapted from the Faculty Handbook. The Employer asserts that it hires non-tenure track faculty basically using the same process used for hiring tenure track faculty. However, none of the 13 non-tenure track hirings in the record involved a search committee, and none of the dean hirings comported with procedures in the Handbook.

As to sabbaticals, the faculty's recommendations have been followed, although for the year 2001-2002 the Administration initially decided to delay the sabbaticals, but this decision was later revised.

As to faculty recommendations on tenure and promotion, the record shows that the Administration has circumvented the provisions of the Faculty Handbook 17 percent and 20 percent of the time, respectively. The record establishes that the Administration rejected four recommendations for promotions made by the departmental promotions committees, and promoted one faculty member to the rank of professor without the involvement of a promotion committee. As described in detail in my Decision and Direction of Election, the record also shows that the Administration has circumvented the tenure process of the Faculty Handbook by unilaterally granting credit toward tenure, as it did when Vincenne Revilla-Beltran was appointed to department chair, and when Portia Weston was hired to direct the Honors Program.

Although the faculty attempted to assert itself on both academic and nonacademic issues including salary administration, shared governance, types of faculty appointments, dean hirings and overload policies, the Administration, through VPAA Stevens, has informed the faculty that it has no say in such matters. Indeed, President Henderson silenced a faculty member who asserted that the Administration's actions in seeking university status and implementing merit pay belied Dr. Henderson's previous statement that the Employer engaged in participatory management. When the faculty member noted that Henderson's view that participatory management meant that she had to listen, but did not have to act in accordance with the views of the faculty, was undemocratic, Henderson responded by emphatically stating, "This is not a democracy."

Despite the Employer's efforts to do so, Henderson's statement cannot be dismissed. She made the statement and she did not limit the extent of its application. All of the facts recited herein and in my Decision and Direction of Election, including the direct statements made to the faculty, show that this is the Employer's view of the role of the faculty and the philosophy under which the Employer operates when it determines whether to implement its

own views when the faculty's views are at odds with the Administration's views. In short, the Administration does not give way to the faculty on matters that it intends to control, whether these matters are academic or nonacademic.

In this case, the burden of proving the managerial status of the full-time faculty, which rests on the Employer, has not been met. The critical criteria here are the program offerings, courses, academic policies, admissions standards, grading policies, syllabi and teaching loads. It is clear, in the context of this case on this record, that the faculty do not possess decisional authority nor do they possess the ability to effectively control or recommend critical academic matters at the University. In this regard the faculty's recommendations are not consistently solicited or adopted, as shown by the numerous examples in the record. Rather, the Employer's admitted managers who comprise its Administration⁷² have made the critical decisions by overriding, circumventing or ignoring faculty input.

Thus, having reexamined the evidence in light of the remand from the D.C. Circuit Court and the Board, for all of the reasons set forth above and in my original Decision and Direction of Election, and based on the record as a whole, I conclude that the Employer has not sustained its burden of affirmatively establishing the managerial status of the full-time faculty in the manner required by Yeshiva and its progeny. Accordingly, I hereby reaffirm my original Decision in this matter that the Employer's full-time faculty are not managerial employees.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001.⁷³

⁷² As noted, there is a one to four ratio between the Employer's Administration and its full-time faculty.

⁷³ A request for review may be filed electronically with the Board in Washington, D.C. The requirements and guidelines concerning such electronic filings may be found in the related attachment supplied with the Regional Office's initial correspondence and at the National Labor Relations Board's website, www.nlr.gov, under "E-Gov."

This request must be received by the Board in Washington by 5 p.m., EST (EDT), on July 24, 2007. The request may **not** be filed by facsimile.

Dated: July 10, 2007

/s/Gerald Kobell

Gerald Kobell, Regional Director

NATIONAL LABOR RELATIONS BOARD
Region Six
Two Chatham Center, Suite 510
112 Washington Place
Pittsburgh, PA 15219

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